FRANK ROSS.....APPELLANT; 1893

*Oct. 4, 5, 6.

AND

ANNIE ROSS AND OTHERS.....RESPONDENTS. 1894

*Mar. 3.

ANNIE ROSS AND ANOTHER.....APPELLANTS;

AND

FRANK ROSS AND OTHERS.....RESPONDENTS.

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

Will, form of—Holograph will executed abroad—Quebec Civil Code, art. 7—Locus regit actum—Lex domicilii—Lex rei sitae—Trustees and executors—Legacy in trust—Discretion of trustee—Vagueness or uncertainty as to beneficiaries—Poor relatives—Public Protestant charities—Charitable uses—Right of intervention—Persona designata.

In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the city of Quebec, while temporarily in the city of New York made the following will in accordance with the law relating to holograph wills in Lower Canada:

"I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for Public Protestant Charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000, which he will send to Miss Mary Frame, Overton Farm"

A. R. and others, heirs at law of the testator, brought action to have the will declared invalid.

Held, Taschereau J. dissenting, that the will was valid.

Held further, Fournier and Taschereau JJ. dissenting, that the rule *locus regit actum* was not in the Province of Quebec, before the code, nor since under the code itself (art. 7), imperative, but permissive only.

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*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Sedgewick and King JJ.

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Held also, Taschereau J. dissenting, that the will was valid even if the rule *locus regit actum* did apply, because it sufficiently appeared from the evidence that by the law of the State of New York the will would be considered good as to movables wherever situated, having been executed according to the law of the testator's domicile, and good as to immovables in the Province of Quebec, having been executed according to the law of the situation of those immovables.

In this action interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay Asylum, a corporate institution for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator claiming as a poor relative.

Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; Sedgewick J. dissenting; but that Finlay Asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will.

Held further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed.

Held, per Fournier and Taschereau JJ., that the bequests to "poor relatives" was absolutely null for uncertainty.

APPEAL and CROSS-APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) (1) affirming the judgment of the Superior Court by which the action to set aside the will of the Hon. James Gibb Ross was dismissed as to part of the claim and affirmed as to the remainder.

(1) Q.R. 2 Q.B. 413.

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The will, which appears at length in the head note, was wholly written and signed by the testator while temporarily in New York in 1865, and was by him mailed from New York to Quebec, addressed to his brother Frank; it was subsequently restored to the testator, who on various occasions subsequently at Quebec delivered it to Mr. F. Ross, the last occasion being in 1883, five years before his death.

The estate in the province of Quebec alone is sworn at about four millions. The testator further had large property, both real and personal, in other provinces of Canada and in the United States.

During the pendency of the suit William Russell Ross, a first cousin and former partner of the testator, then in bad health and advanced in life, in poor circumstances and with a large family, applied for assistance, pleading the terms of the will, and upon being refused he presented a petition in intervention which was allowed, cause to the contrary being shown by plaintiffs and defendants.

Subsequently further interventions were filed by Morrin College and Finlay Asylum, claiming to be public protestant charities and as such to be interested in supporting the validity of the will.

Plaintiffs and defendants also opposed these interventions, but the points taken were decided against them by the Superior Court.

The plaintiffs contended that the will was invalid because, being in holograph form, it was made in New York where wills made in that form are not in general recognized; and, further, that the trust devise is void for uncertainty, and that thus the trust half should be apportioned amongst the heirs-at-law. Mr. Frank Ross answered that the will was in all respects valid, that under it he took the estate "subject to the trusts therein stated," and that, by the law of New York, wills made

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by persons domiciled elsewhere are valid in that State, so far as personalty therein is concerned, if made in the form required by the law of the testator's domicile. To the interventions, the plaintiffs and the defendant, Frank Ross, pleaded similar defences—the defendant in addition demurring.

For pleas to the interventions plaintiffs set up:

1. The will was bad in form as having been made in New York.

2. Under no circumstances is Morrin College—an institution under Presbyterian control—entitled to anything.

3. Under no circumstances is the Finlay Asylum—an institution under the control of the Church of England—entitled to anything.

4. Under no circumstances is William Russell Ross entitled to anything, because Mr. Frank Ross "has declared that in his judgment the said intervenant is not entitled to any part of the money so bequeathed as aforesaid."

5. The firm, composed of W. R. Ross and testator, lost money, which fact disqualifies W. R. Ross from receiving anything under the will.

6. The whole of the estate of the testator has been vested in Frank Ross by the will, and no separate trust has been created by the will, and neither the intervenants nor any other person have a right to interfere with Frank Ross in the matter of any bequest whatever, the whole will (except the bequest to Mary Frame) being entirely and absolutely at his discretion, supposing that the will is valid as the intervenants pretend.

The defendant Frank Ross contested the interventions on the grounds following:

1. That the whole estate and succession was absolutely his own, and the bequests in favour of public pro-

testant charities and of poor relations were void for vagueness and uncertainty, and conferred no right whatever in favour of any charity or relation.

2. As Episcopalian and Presbyterian institutions, the Finlay Asylum and Morrin College have no claim under the will.

3. At the time of the death of the testator W. R. Ross was indebted to his estate in the sum of $116,279.30, for his share of a losing speculation in 1872, and for a subsequent advance of $40,000 made in 1885, and is consequently disqualified from taking under the will.

4. For the reasons stated, and denying that he is called upon to exercise any discretion, Frank Ross declared that under no circumstances will he ever give anything to his cousin, W. R. Ross.

McCarthy Q.C. and *Stuart* Q.C. for the appellant Frank Ross.

The present appeal is from part of the judgment of the Court of Queen's Bench for Quebec, confirming the judgment of the Superior Court, whereby the legality of the bequest in the will directing the appellant to use one-half of his estate for public protestant charities in Quebec and Carluke and amongst poor relatives as he should judge best, was sustained.

The evidence establishes that a holograph will is invalid according to the laws of New York unless executed by the testator in presence of two witnesses and attested by them; that nevertheless, a holograph will, executed in New York by a person domiciled in Quebec, would be valid in New York to pass personal property, but not real estate, provided the will were valid in Quebec. Sec. 2611 N.Y. Code of Procedure.

A testamentary bequest, to be valid, must be the expression of the will of the testator; he cannot make a legacy depend upon the will of a third person, nor

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can he leave the choice of the legatee to a third person. Pothier (1); C.C. art. 756; 7 Aubry & Rau (2); Toullier (3); 3 Zachariae (Massé & Vergé) (4); 18 Demolombe (5); *Re Jean Merendol* (6); Merlin (7); *de Sauvan* v. *de Sarrieu* (8); *Moeglin* v. *Willig* (9); *Détève & Détève* (10); *Laboujouderie* v. *Raffier* (11); *Legrand-Masse* v. *Héritiers Lépine* (12); *Beurier* v. *Emorine* (13); *Britelle* v. *Déyvrande* (14); *Simon* v. *Simon* (15).

Saying that if no discretionary power had been given the law would imply equal distribution and the court would distribute equally, would be to assume the validity of a bequest to charities unnamed and undefined, and to relatives undescribed. In *Liddard* v. *Liddard* (16) the question arose as to the distribution of property among the children of the deceased. In such a case our law provides for equal distribution but as between relatives, some distant and some close, the law gives to the nearer collateral relations to the entire exclusion of the further.

The Superior Court has not the powers of the courts in France, nor of the Parlement de Paris, and cannot overrule the express provisions of the statute 34 George 3, ch. 6, which while conferring upon the Courts of King's Bench, to which the Superior Court succeeded, the jurisdiction of the Prevôté de Paris, provided that nothing in the act should grant the court legislative powers possessed by any court prior to the conquest.

(1) (Bugnet's ed.) vol. 8 Traité des Donations entre-vifs no. 73.
(2) P. 69, ss. 655, 656.
(3) vol. 5 nos. 350, 351, 606.
(4) P. 34, note 8.
(5) Nos. 608, 618.
(6) Merlin Repertoire vo. Légataire sec. II, p. 425 Belgian edition.
(7) Repertoire vo. Institution d'Héritier, sec. v. ss. 1, no. xviii, vol. 15, p. 367.
(8) S.V. 57, 1, 182.
(9) S.V. 52, 2, 435.
(10) S.V. 49, 2, 538.
(11) S.V. 41, 2, 240.
(12) S.V. 27, 1, 409.
(13) S.V. 60, 1, 346.
(14) Dalloz. Recueil 70, 1, 202.
(15) Journal du Palais 1827, p. 132
(16) 28 Beav. 266.

Stuart v. *Bowman* (1); *McGibbon* v. *Abbott* (2); *Tilden* v. *Green* (3); *Levy* v. *Levy* (4).

What shall be considered charities in England is settled by the statute 43 Elizabeth c. 4.

The doctrine of the English law, which it is suggested the court should follow in this case, for the purpose of preventing the legacy from lapsing in the event of the appellant not executing it, has been harshly criticised and does not recommend itself either by its wisdom or its justice. *Cary* v. *Abbot* (5). See remarks by Sir William Grant in *Morice* v. *The Bishop of Durham* (6).

The decisions in *Contant* v. *Mercier* (7) have no material bearing upon this discussion, as the question of jurisdiction and power was never raised.

The intervening parties should be not only possible but certain beneficiaries, to justify their intervention. The old rule "*l'intérêt est la mesure des actions*," as contained in the Code of Procedure art. 13, applies. The decision in the Privy Council in *McGibbon* v. *Abbott* (8), appears to support the view that where a person's rights are dependent upon the exercise of a legal discretion vested in another, no right to defend the instrument creating the discretion accrues until after the exercise of the discretion has created a right. *Isaac* v. *Defriez* (9); *Attorney-General* v. *Price* (10); *Anon.* (11).

As to the Morrin College, it is an educational institution and in no sense a charity.

The Finlay Asylum, though a charitable institution in the proper acceptation of the word, is not a public

(1) 3 L.C.R. 309.
(2) 8 Legal News 267.
(3) 130 N.Y. 29.
(4) 33 N.Y. 107.
(5) 7 Ves. 490.
(6) 9 Ves. 399; 10 Ves. 537.
(7) 20 R.L. 379, 382.
(8) 10 App. Cas. 653.
(9) 17 Ves. 373*n*.
(10) 17 Ves. 371.
(11) 1 P. Wm. 327.

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charity. By its Act of Incorporation, 20 Vic. ch. 219, the Finlay Asylum is founded for the relief of persons of the communion of the Church of England, and the government of the institution is vested in the rector and churchwardens of the parish church of Quebec.

Geoffrion Q.C. and *Lafleur* for appellants, Annie Ross and John Theodore Ross. The will in question was made before the coming in force of the Civil Code, and its formal validity must be decided by the law at the time of its execution. Dalloz (1).

None of the articles of the Code which refer to this subject purport to introduce new law. They express the law as it stood immediately before the passing of the Code, and for a long time anterior thereto.

Article 7 of our Civil Code adopts in its entirety the rule *locus regit actum*. This rule was always considered as imperative, and not merely facultative. *Re Gilbert Andras* (2); *de Pommereu* (3); Merlin (4); *in re de Boisel* (5); *in re d'Argelos* (6).

All decided in the *Picqassary case* (7), was that holograph wills were authorized by the custom of Angoulème. See also, Bourjon (8); Ricard (9).

Article 999 C. N. really emphasizes the rule by creating a special exception in favour of holograph wills made abroad by Frenchmen. Demolombe (10); Marcadé sur art. 999. Laurent (11); *Browning* v. *de Nayve* (12); *Mendès* v. *Brandon* (13); Aubry & Rau (14).

(1) Rép. "*Dispositions entre-vifs et testamentaires*," nos. 3499, 2504 and 2507 and the authorities there cited.
(2) 17 Guyot Rép. vo. Testament, 167-8.
(3) 7 Journal Audiences, 515.
(4) Rép. vol. 17, p. 532-3
(5) 7 Journal des Audiences, 689.
(6) 7 Journal des Audiences, 520.
(7) Journal des Audiences, vol. VII, p. 528.
(8) Vol. II, p. 305.
(9) Don. vol. I, p. 322, no. 1286.
(10) Vol. XXI, pp. 450-4, nos. 482-3.
(11) Principes, vol. XIII, p. 166, no. 159.
(12) Dal. 53, 1, 217.
(13) Journal de Palais 1850, 2, 187.
(14) Vol. I, p. 112, par. 31.

In England and Scotland, up to 24 & 25 Vic. ch. 114, the rule was that validity of the will depended on the law of the testator's last domicile. By this act British subjects, only in so far as regards personal estate, may adopt the forms recognized by the *lex actus*, or by the law of the domicile of origin. Dicey On Domicile (1).

In the United States the rule recognized is that of the testator's domicile. Story Confl. of Laws (2).

The rule of the law of New York requires conformity to the law of Quebec; and as the law of Quebec requires that the formalities of foreign law should be adopted and followed the provisions of our law have not been complied with, and the will is invalid.

The Marquis de Bonneval died in 1836, in London, where he had resided for a considerable period, and left a will executed in England in the English form dated 19th September, 1814. The will was contested and the question debated whether the Marquis de Bonneval was domiciled in England or in France. The court held that the testator had never lost his French domicile of origin, notwithstanding his prolonged residence in England, that the validity of the will should be decided by the French law, and ordered a suspension of proceedings until a decision should be obtained from the French courts. *De Bonneval* v. *De Bonneval* (3).

Both the Court of Appeal and the Cour de Cassation held that as the testator had followed the usual form required by the place of execution (England), the will must be held valid.

If the will in question is considered as a will in the English form it could not operate in regard to realty even in Quebec, inasmuch as it does not comply with

(1) Pp. 298, 303.
(2) Par. 468.
(3) Jour. du Palais 43, 1,288; 1 Curt. 856.

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the requirements of the Statute of Frauds. *Meiklejohn* v. *Atty.-Gen.* (1).

Sec. 10 of the Quebec Act merely introduced a new form of will, and must be interpreted as referring to wills made within the province. Endlich on Statutes, ss. 174, 387; *Migneault* v. *Malo* (2).

The French rule *locus regit actum* is part of our law, is an imperative rule, and was constantly and inflexibly applied by the highest courts in old France, and is still applied by the Cour de Cassation in France, and cannot be characterized as unreasonable or inconvenient as compared with the English rule in force when the Quebec Act was passed, and down to the Imperial Act 24 & 25 Vic. c. 114.

The power of election given Frank Ross by the will is so absolute that he might, following *McGibbon* v. *Abbott* (3), entirely exclude any one of the intervenants.

The rule known as the *cy près* doctrine, when the beneficiary can not be ascertained, has no place in our law, nor do the modern French decisions apply (4). To follow the case of *Liddard* v. *Liddard* (5), would be to violate the testator's express intention. The legacy to charities and poor relations should be declared to be void for vagueness and uncertainty, and because, in the absence of the exercise by Frank Ross of the discretionary powers vested in him by the will, the courts of this province could not enforce the execution of this bequest.

The present appellants do not agree with Frank Ross as to the disposition which should be made of the fund representing this trust in the event of the bequest being set aside. If the charitable bequest is void heirs-at-law are entitled to half the estate.

(1) Stuart's L.C.Rep.581; 2 Kn. 328.
(2) 16 L. C. Jur. 288; L.R. 4 P.C. 123.
(3) 8 Legal News 267.
(4) Dalloz 46, 2, 155.
(5) 28 Beav. 266.

Presumptive heirs of a man still living would not be permitted to take any proceedings, even conservatory, with respect to an estate in which they may never have any real interest, and it is difficult to see why the present intervenants should be in any better position than presumptive heirs.

With regard to William Russell Ross, such discretion as the trustee may have has been exercised so as exclude him from all participation in the estate.

As to Morrin College, under its charter, 24 Vic. ch. 109, which provides in section 7 that all the property belonging to the corporation shall be exclusively applied to the advancement of education in the college, and to no object, institution or establishment whatever not in connection with nor independent of the same, it cannot be regarded as constituting a charitable institution.

As regards the Finlay Asylum, incorporated by 20 Vic. c. 219, such a sectarian institution cannot pretend to be a public charitable institution of Quebec, and has no *locus standi* in this case, and no right or interest to support the will in question.

McCarthy Q.C. and *Stuart* Q.C. for respondent Frank Ross on the appeal of Annie Ross *et al*, prayed the confirmation of that part of the judgment appealed from, whereby the sufficiency of the will is established, citing:—C. C. art. 7; Pothier Don. ch. 1, art. 1, s. 1; Arrêt of 14th July, 1722 (Jour. des Audiences, lib. 5, ch. 31. Ricard (1); Bornier (2); Boullenois (3); Savigny, Private International Law, p. 265. Fœlix, Droit International Privé (4); 5 Pardessus (5); 1 Laurent (6); Dalloz (7); 1 Aubry & Rau (8).

(1) Traité du Don Mutuel no. 306.
(2) Ch. 28, no. 20.
(3) Vol. 2 pp. 75, 78.
(4) No. 83, p. 107.
(5) Droit Commercial, p. 255, no. 1486.
(6) Nos. 100, 101, 102.
(7) Répertoire vo. Lois, no. 430.
(8) P. 112 § 31, no. 6, note 79.

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Geoffrion Q.C. and *Lafleur* for respondents Annie Ross and John T. Ross on the appeal of Frank Ross. The reasons and authorities on behalf of these respondents have been set forth at length on their own appeal.

Irvine Q.C. and *Cook* Q.C. for respondents "The Morrin College" and "The Finlay Asylum." (*Fitzpatrick* Q.C. with them).

The question for solution is: Is a holograph will made in New York by a person temporarily there, but domiciled at the time in the province of Quebec, and owning both moveable and immoveable property in said province, which is disposed of by the will, valid, such form of will not being locally recognized by the laws of New York, although the rule prevails there as elsewhere generally in the United States, that a will disposing of moveable property is valid if made in the form prescribed by the laws of the testator's domicile—one disposing of immoveables being only valid if made in accordance with the law of the place where the real property is situated—*lex rei sitae*?

Against the validity of the will it is urged that the matter must be governed by our own law, and that by it the maxim, *locus regit actum*, requires a will made in New York to be made in a form valid by the laws of that state on pain of nullity. It is contended that article 7 of our Code, based on the ancient law, follows this rule, and declares, at least by implication, that acts and deeds are invalid if not made in the form required by the *lex loci actus*; that our Code must be interpreted on this point in conformity with the old French law which prevailed in this province, and that by that law such a will was invalid.

Such a conclusion seems to be contrary to the whole avowed policy of our Code and of the Imperial statute 14 George 3, ch. 83, on the subject of wills, by which freedom of willing and facilities for doing so were

extremely favoured and carried far beyond anything known to the old law, the policy of which in this respect was the very reverse of our own, seeking as it did uniformly to restrict the powers of and facilities for disposal by testament.

See Merlin's opinion *re de Mercy* (1). He is far from placing the maxim *locus regit actum* on a firm foundation as a rule of settled law. He cites the law and a large number of writers, including Vinnius, Burgundius, Rodenburg, against the rule. Again in the same article (2), Merlin reports an appeal judgment in the case of the will of Despuget, of the 20th August, 1806, which clearly shows how far the doctrine was from settled law. Troplong (3), speaking of article 999 of the Code Napoleon, does not say that it is an innovation or new law, but asserts that it gives the preference to the opinion of Ricard and his school, the opposite opinion, that is, from that of Furgole, Guyot and Merlin, which opinion was supported not only by Ricard, but by Boullenois, Cujas and many of the greatest names in French jurisprudence as well as by *arrêts* of parliament. Troplong refers to an *arrêt* to that effect as not an isolated one; and how divided views were on the question is seen in the statement of the various opinions by Pothier, and by all the authors who discuss it (Laurent, Droit Int., vol. 6, nos. 406, 422, 424), or by referring to even the last *arrêt* reported by Merlin, or to any *arrêt* that deals with the subject, an example of which is seen in the *arrêt* of Cambolas, liv. 4, ch. 41, where the question is discussed both as regards wills and contracts in an *arrêt* of the 7th of August, 1622, there reported. The old writers and Ricard, cited under C. C. art. 854, are in favour of the validity of such wills made abroad, in conformity with the law of the testa-

(1) Répertoire vo. Testament, sec. 2, par. 3, art. 8.

(2) Sec. 2, par. 4, art 1.

(3) Don. Test. No. 1734.

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tor's domicile. In this they are supported by Boullenois and by Cujas. At no. 191 of part I of Ricard, he cites an *arrêt* in support of the validity of a holograph will by letter missive, and gives as a precedent the case of the codicil made by Lentulus in a letter written from Africa, which was approved by Augustus, and became law as stated in the Institutes B. 2, tit. 25.

Wharton, Conflict of Laws, 2nd ed. p. 573, and sec. 588; Story, Conflict of Laws, ss. 465, 468, *et seq.*; 4 Burge, Colonial and Foreign Laws, p. 582 *et seq.*, and p. 590; Savigny, sec. 381, p. 324. The observance of the form in use at the place of the act is merely *facultative*, and allows an election. Fœlix, p. 107. Bar 36. Westlake, Private International Law, 123. Fœlix, vol. 1, p. 181. C.C. art. 6 and authorities *in pede*, art. 7, C. N. 999; *Abbott* v. *Fraser* (1); C. C. arts. 850, 854; Troplong, Don. Test. vol. 3, p. 392, no. 1465; 1 Laurent, Droit Civil, 158, 162; 6 Laurent, Droit. Int., 653; Aubry & Rau, vol. 7, subsec. 699; 21 Demolombe 142.

The Imperial statute 14 Geo. 3, introducing the absolute freedom of devise by will, and the right of willing in the English form "with all its incidents," laid down by the Privy Council in *Migneaut* v. *Malo* (2), necessarily introduced the right of making a will in the form of the *lex domicilii*. Until the Code the power to make wills in this form existed, and British subjects could make them anywhere. *Meiklejohn* v. *The Attorney General* (3). Personalty follows the law of the domicile, wills are valid if made in accordance with the law of the domicile, and only valid (till 24 & 25 Vic.), if made according to such law. This principle is a rule of private international law, and part of the *jus gentium*. *Croker* v. *The Marquis of Hertford* (4); *Bremer* v. *Free-*

(1) Ramsay's Dig. p. 857.
(2) 16 L.C. Jur. 288
(3) Stuart's L.C. Rep. 581; 2 Kn. 328.
(4) 4 Moore P.C. 339.

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man (1); *Whicker* v. *Hume* (2); Story, Conflict of Laws (3); Wheaton (4).

Under the old law of France previous to the cession the weight of authority was in favour of the rule *locus regit actum* being facultative and not imperative, in relation to wills; and during the last 150 years the rule that a testator may make his will, in relation to personalty, according to the *lex domicilii*, has by common assent become a rule of private international law.

The will is valid under 14 Geo. 3, ch. 83, in force when it was made, and preserved *quoad* it, by C. C. art. 2613.

The *lex loci actus* was not violated but observed, the law of New York empowering strangers to make wills according to the *lex domicilii*. The devise in trust and the discretion of the trustee come expressly under art. 869 of the Civil Code which the codifiers (fourth report art. 124 *bis*, p. 181) state to be purely old law. The nature and extent of this discretion is well stated by Troplong, Pothier and all the authors (5). *Quoniam quasi viro bono ei potius commissum est, non in meram voluntatem hæredis collatum.* The discretion in this case is much less than in those cited.

The expression, *as he may judge best*, would not admit of discussion in view of the opinion expressed by all the authors—that *si putaveris* is binding. Frank Ross is bound to distribute the trust estate whether he will or not, to the best of the judgment of a *bonus vir*, due regard being had, as Troplong says, to the fortune to be distributed, the position and needs of the recipients and all other circumstances.

To judge of the distribution evidence can be given, even parol, before the court of all matters that will

(1) 10 Moore P.C. 306.
(2) 7 H.L. Cas. 124.
(3) Secs. 380, 381.
(4) 3 ed. p. 134.
(5) 1 Troplong, Don. Test., nos. 277, 278; 6 Pothier, Don. Test., ch. 2, art. 8.

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enable it to judge of the *bona fides* of the distribution, and how far it conforms to the judgment or *arbitrium boni viri* (1); *Dellevaux* v. *Jambon* (2).

The trustee cannot defeat the trust by refusing to distribute the fund. The court will do it for him even under English law where the courts allow much more absolute discretion to trustees than does our own, which in this respect is based on the equitable doctrine of the Roman law approved and adopted by Pothier and our best jurists. But even by English law the trustee must distribute the funds. Thus Lewin on Trusts ch. 28, p. 836, is in point. *Gower* v. *Mainwaring* (3).

The fact of a trustee having refused or failed to make a distribution is a ground on which the court will interfere and control him. Lewin, 777. The discretion is not as to who are to be the objects of the charity or bequest, but as to the proportion to each, and that must be *bonâ fide* and not capriciously determined. Lewin, 839.

Abbott v. *McGibbon* (4) does not apply, as the object arrived at in substitutions is to conserve the property in the family, and that object is secured by giving to one of the family. In the Ross will the object is to support charities generally of a particular class and poor relations, and to give all to one or to a few is to defeat the intention of the testator. For *arrêts* see Ricard, no. 589, and *Beaucourt* v. *Soc. &c. de Lille* (5).

There is no vagueness and uncertainty in the sum, for the amount is fixed, nor in the objects, for they are readily ascertainable. No microscopic search is required to discover the public Protestant corporate charities of this city and of a small Scotch village.

(1) 4 Demolombe, Don. Test., no. 37; 7 Aubry & Rau, par. 712.
(2) S.V. 80, 2, 197. and 72, 1, 406; and see Wigram on Interpretation of Wills, p. 51; Jarman on Wills, 392, 397.
(3) 2 Ves. 87.
(4) 8 Legal News, 267.
(5) S.V. 75, 1, 307.

See also *Noad* v. *Noad* (1); *Molson's Bank* v. *Lionais* (2); *Comte* v. *Lagacé* (3); *Russell* v. *Lefrançois* (4); *Harding* v. *Glyn* (5); Taylor, Ev. (6); *Moggridge* v. *Thackwell* (7); *Power* v. *Cassidy* (8).

It is sufficient for the intervenants to establish a *primâ facie* interest; the question of their absolute rights is to be decided when other claimants have been notified to appear. The immediate object is to defend the document on which their rights depend, which is impugned by both the plaintiffs and the defendant.

The charter of the Finlay Asylum (20 Vic., ch. 219) establishes that it is a public Protestant charity at Quebec.

The case of Morrin College is still stronger. The testator was for years a governor; he repeatedly expressed his intention of providing for it substantially; a short while before his death he stated that the college had been opened prematurely and on insufficient means, that it was doing a good work and would succeed, and he was in the habit of contributing to its bursary fund for the assistance of students with limited means.

What Morrin College is, and was intended to be, its charter (24 Vic. ch. 109), the trust deed and deed of gift produced in the case, the statement of the first principal, and the evidence abundantly show. The deeds explain Dr. Morrin's intentions:—

"Whereas, the said Joseph Morrin is desirous of leaving some permanent memorial of his regard for the city of Quebec, * * * and at the same time of marking his attachment to the Church in which he was reared, and to which he has always belonged;

"And, whereas, he considers none can be more suitable for both purposes than a provision for increasing

(1) 21 L.C. Jur. 312.
(2) 3 Legal News, 83.
(3) 3 Dor. Q.B. 319.
(4) 8 Can. S.C.R. 335.
(5) 1 Atk. 469.
(6) 9th ed. s. 1131.
(7) 3 Bro. C.C. 517.
(8) 79 N.Y. 602.

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and rendering more perfect the means of obtaining for the youth generally, and especially those who may devote themselves to the ministry of the said Church, the means of obtaining a liberal and enlightened education; he does, &c., &c."

The inaugural address declares the principles which were intended to guide the policy of the college, and which have ever since been pursued. For over thirty years, with very limited resources, it has, apart from theological instruction which was necessarily presbyterian, afforded a liberal and enlightened education to all desirous of obtaining it, without test or subscription of any kind, and by means of professors belonging, not only to the various Protestant churches, but to the Roman Catholic church. Nominal fees exacted from others have never been required from poor students, who have also, apart from their religious belief, been aided by money bursaries and free accommodation in the college rooms. The generous intention of the founder was to supply a want which, the University being exclusively Catholic, and its instructions given almost entirely in the French language, could not so well render to the Protestant and English speaking youth.

Both French and English law regard colleges as charities. If the statute of Elizabeth on charitable trusts is in force in this province the question does not admit of a doubt; and in a sense it is submitted that that statute is in force. From the earliest period the King, as *pater patriæ*, was by his prerogative the guardian and protector of charities. The act of Elizabeth declared and defined the charitable objects over which the prerogative extended, and in this sense it forms part of our law, as necessarily being introduced at the cession of the country to the British Crown.

C.C., 869. Theobald, pp. 181, 182. *Pomeroy* v. *Willway* (1).

The King's Edict of 1743, cited in *Fraser* v. *Abbott* (2), prohibited under certain circumstances the foundation of charitable establishments by will.

Our own statute book, in which for the last hundred years educational and benevolent institutions are classed together, fully bears out this view. *Desrivières* v. *Richardson* (3).

No order was made in the Superior Court as to costs. As to whether the estate generally, as held by Chief Justice Meredith, in *Russell* v. *Lefrançois* (4), and supported by this court (5), the losing parties individually, should bear the costs, it is for the court to say. It is clearly a hardship for the successful parties to be compelled to bear their own. It may be said that no appeal has been taken by the intervenants in this case. That is true; but all costs are in the legal discretion of the court seized of the cause; and in *Peters* v. *The Quebec Harbour Commissioners* (6), where no appeal was taken on this subject, the court dealt in its own way with costs. The respondents submit that costs should be awarded in all courts.

The respondents ask that the judgment appealed against be affirmed, and costs awarded them in all courts;

1. Because the will is in all respects valid, both as a holograph will under the French system, and as a will of personalty under the English system in force in this province in 1865;

2. Because, under the will, a valid trust was established, to the extent of one-half of the estate passing under it, in favour of charities and poor relations, and

(1) 59 L.J. Ch. 172.
(2) Ramsay's Digest, 861.
(3) Stuart's L.C. Rep., 226.
(4) 5 Legal News 81.
(5) 8 Can. S.C.R. 375, 384.
(6) 19 Can. S.C.R. 685.

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by proving the will and accepting and administering the estate, Mr. Frank Ross accepted the office and assumed the duties and responsibilities of a trustee;

3. Because Morrin College and the Finlay Asylum are public Protestant charities within the meaning of the will; and William Russell Ross is a poor relative within such meaning, and as such they had an interest to intervene for the purpose of defending and establishing the validity of the document upon which their rights and those of their co-beneficiaries depend;

4. Because Frank Ross having asserted that the whole estate devised was his own absolutely, and having disregarded the obligations of a trustee, the respondents were bound to intervene to protect their interests; particularly as the plaintiff and defendant plead that the trust devise of half the estate is void, and only differ as to its distribution;

5. Because Frank Ross, pleading that the will was valid, is estopped from denying the validity of such trusts on the issues with the intervening parties.

Irving Q.C. and *Cook* Q.C. for respondent W. R. Ross on both appeals.

William Russell Ross is admitted to be a poor relation. His interest, however, is barred, in the opinion of both plaintiff and defendant, from the double fact of his having lost money when in partnership with the testator, and having owed money to the estate when he died. And so Frank Ross, while denying that he is called upon to exercise any discretion, uses what he terms his discretion, and excludes his cousin. Rights, conferred by the testator, cannot be thus summarily dealt with without a mockery of justice. That James Gibb Ross intended that his poor relations, others than his heirs-at-law, should be benefited is proved by this. In 1865 he had but two heirs-at-law apart from Frank, for whom the will provided, and they

both were then as wealthy as, if not more wealthy than, J. G. Ross himself.

The respondent, William Russell Ross, submits that the judgment of the court appealed from is in all respects right, in so far as it affects him, save as to costs. He relies on the opinions of Mr. Justice Andrews, and of the Chief Justice of the Court of Queen's Bench, and on the reasons urged by the intervening parties, Morrin College and Finlay Asylum, and prays that the appeals be dismissed with costs in all courts.

THE CHIEF JUSTICE.—First, as regards the principal action which had for its object a declaration that the will was null and void, I am of opinion that the plaintiffs fail and that the action must be dismissed as against the defendants Frank Ross and Dame Mary Frame, with costs. In other words, I am for affirming the judgment of the Superior Court so far as it relates to the principal action in all respects, except that portion of it which declares the will void as to immovables situate in Ontario, New Brunswick, British Columbia and in the United States. I think the judgment in this last respect was wrong. There was no jurisdiction in the Quebec courts to deal with such immovables, the question of the validity or invalidity of wills as to immovable property being one exclusively for the forum *rei sitae*. I will not say that the judgment does any harm by this declaration, but it being irregular and without jurisdiction I think the judgment of the Superior Court, and of the Court of Queen's Bench which affirms it, should be rectified by striking out all about immovables in Ontario, New Brunswick, British Columbia and the United States. This would leave the judgment, so far as concerns the principal action, a judgment dismissing the action. This dis-

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missal of the action should, for manifest reasons, be with costs to Frank Ross and Dame Mary Frame.

My reasons for this conclusion as to the disposition of the appeal from the judgment in the principal action, are as follows: First, I am of opinion that the rule *locus regit actum* was not before the enactment of the code (nor since under the code itself, art. 7) imperative, but permissive only. The jurisprudence is, it is true, contradictory, but Pothier treats it as an unsettled point, and such great authorities as Boullenois, Ricard, Massé, Mailher de Chassat, Wharton, Story, Westlake, and I may say all modern writers whose opinions are entitled to weight, are in favour of *locus regit actum* being regarded as permissive only. To hold it to be imperative would be harsh and unreasonable, entirely at variance with the policy of the law of Lower Canada since the Quebec Act, 1774, which favours the exercise of the testamentary power instead of discouraging it, as was the policy of the old law of France, and most arbitrary in making the sufficient execution of a will depend upon the locality of a testator who, whilst *in transitû*, makes his will according to the law and forms of his own domicile. Viewed as permissive only the rule *locus regit actum* is, on the other hand, most beneficent and reasonable since it enables a testator who wishes to make an authentic will to avail himself of the notaries and public officers of a foreign country through which he may be passing at a time when he would not be able to avail himself of the instrumentality of the notaries and public officers of his domicile. I therefore conclude that the will was good because made in strict accordance with the law relating to holograph wills prevailing in the province of Quebec, in which province the testator was domiciled, both at the time of the will and at the time of his death.

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Secondly, I agree with the reasons of the learned Chief Justice in his judgment in the Court of Queen's Bench, that even if the rule *locus regit actum* does apply, yet it sufficiently appears from the evidence, that by the law of the State of New York this will would be considered good as to movables everywhere, and as to immovables in Quebec. Good as to movables wherever situated because it was executed according to the law of the testator's domicile, and good as to immovables in the province of Quebec because executed according to the law of the situation of those immovables. Therefore, applying the rule *locus regit actum* the will was a good will according to the law of the State of New York, at least to the extent to which it can properly come under the jurisdiction of the courts of the province of Quebec; that is to say, excluding the immovables situate in the provinces of Ontario, New Brunswick and British Columbia, and in the United States.

Then as to the Interventions. As the principal action was to annul the will, and as that action is dismissed, we are not called upon to interpret the legacies to any greater extent than is rendered necessary for the purpose of disposing of the interventions, but to this extent we must interpret it in order to ascertain if the parties had any right to intervene.

Then the intervention of William Russell Ross must be dismissed because he has no *locus standi* to maintain it.

The gift to "poor relations" is, according to the terms of the will, not an absolute gift to the objects the testator intended to benefit, but rightly interpreted is to be read as conferring upon Frank Ross a faculty of selection amongst persons coming within that description. Could William Russell Ross have possibly derived any benefit under this disposition? If it had

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been in the power of Frank Ross to select him as one of the beneficiaries I should unhesitatingly have agreed with the learned Chief Justice of the Queen's Bench in holding that William Russell Ross had a *locus standi* to maintain an intervention in favour of the assailed will, though his interest would be contingent and uncertain until Frank Ross should exercise his faculty of selection. But according to the interpretation which I put on the description "poor relations," Frank Ross had no power to select this William Russell Ross, who was a cousin of the testator only and not one of his heirs-at-law, as a beneficiary under the will. "Poor relations" must be interpreted as meaning "heirs-at-law." The word "poor" is too vague and uncertain to have any meaning attached to it, and must therefore be rejected. The word "relations," then standing alone, must be restricted to some particular class, for if it were to be construed generally as meaning all relatives it would be impossible ever to carry out the directions of the will. The line must therefore be drawn somewhere, and can only be drawn so as to exclude all except those whom the law, in the case of an intestacy, recognizes as the proper class among whom to divide the property of a deceased person who dies intestate, namely, his heirs. Then William Russell Ross is not an heir; therefore his intervention must be dismissed with costs to Frank Ross, but without costs as regards the plaintiffs and other heirs who contested the intervention on a ground which failed, namely, that the testament was null.

As regards the intervention of "Morrin College," it does not come within the description of a charitable institution according to the ordinary meaning of the words, for in administering the law of the province of Quebec we have, of course, nothing to do with technical charities under the English law and the statute of

Elizabeth. If, therefore, Frank Ross were to select Morrin College as a charitable institution entitled to benefits under the will his selection would be unauthorized and void, for it does not appear from the record that that seminary of learning is an eleemosynary institution. Consequently, for the same reason as in the case of William Russell Ross, the intervention of Morrin College must be dismissed with costs to Frank Ross.

As regards the intervention of Finlay Asylum, it stands on a different ground from the other interventions and must be maintained upon the principle the learned Chief Justice states. It would be competent to Frank Ross to select Finlay Asylum as a beneficiary, and this gives that institution a right to intervene for the purpose of supporting the will. Frank Ross fails, therefore, in his contestation in this respect and must pay the costs of the intervention of Finlay Asylum.

As I say above, I only interpret the will so far as is necessary for disposing of the interventions. I disclaim any intention of construing its provisions as to these legacies to poor relatives and charities beyond this. I therefore leave open for future consideration, and for a determination in some further action or proceeding if the parties cannot agree, the questions of how far Frank Ross's powers of selection go; whether he can give to some of the heirs and exclude others, or whether he must give something to all; and I would say the same with reference to the charities. Further, the question of whether Frank Ross himself is entitled to benefit as one of the heirs is not in any way prejudiced by the present judgment. The judgment in the principal action must, therefore, be varied by omitting all reference to the immovables outside the province of Quebec, and by simply dismissing the action with costs to

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Frank Ross and Dame Mary Frame. The intervention of William Russell Ross and that of Morrin College must both be dismissed with costs payable to Frank Ross. The intervention of Finlay Asylum must be maintained with costs against Frank Ross.

As regards the costs in the Court of Queen's Bench, Frank Ross and Dame Mary Frame are to have their costs of the appeal from the judgment in the principal action, and Frank Ross is to have his costs of the appeal in respect of the intervention by William Russell Ross and Morrin College and must pay the costs of the appeal of Finlay Asylum, and in this court the costs must be disposed of in the same way as in the court of Queen's Bench.

FOURNIER J.—L'action en cette cause, intentée par Dame Annie Ross contre Frank Ross et autres, a pour but principal de faire déclarer nul le testament olographe de feu James Gibb Ross. Après avoir allégué le décès, à Québec, le 1er octobre 1888, du dit feu James Gibb Ross, elle déclare que plus d'un an après, le 28 octobre 1889, un testament olographe, daté du 8 février, 1865, à New-York, a été trouvé à sa résidence, lequel se lit comme suit :

I hereby will and bequeath all my property, assets or means of any kind to my brother Frank, who will use one half of them for public protestant charities in Quebec and Carluke, say the Protestant Hospital Home, the French-Canadian Mission, and amongst poor relatives, as he may judge best, the other half for himself and for his own use, excepting two thousand pounds which he will send to Miss Mary Frame, Overton Farm.

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Elle allègue ensuite que ce testement est nul, parce qu'il a été fait à New-York dans une forme qui n'est pas reconnue par la loi de cet État ; elle allègue de plus que le défendeur Frank Ross a seul pris possession de la succession en vertu de ce testament, et qu'elle, la deman-

deresse, ainsi que les autres défendeurs sont les seuls héritiers légitimes du dit feu James G. Ross, ayant droit à sa succession.

En vertu d'un amendement permis plus tard, la demanderesse a ajouté à sa déclaration les allégations suivantes, que même si ce testament pouvait être considéré valable dans aucune partie, il était certainement illégal quant à tous les immeubles situés en dehors de la province de Québec, parce que la loi des pays de leur situation, ne reconnaissait pas la validité d'un semblable testament quant aux immeubles, et que quant à l'autre moitié léguée à Frank Ross pour être distribuée à sa discrétion parmi les institutions charitables, et à des parents pauvres, le dit James G. Ross devait être considéré comme décédé *ab intestat*, attendu que ce legs était nul pour cause d'incertitude. Elle concluait à la nullité du testament, que le dit Frank Ross fut condamné à lui livrer un neuvième de la succession, et de plus, à lui rendre compte des fruits et revenus.

Frank Ross et Mary Frame, ont seuls plaidé à l'action, la validité du testament du dit James Gibb Ross ; que ce testament, quoique fait à New York, a été apporté par le testateur à son domicile à Québec, qu'il l'a toujours conservé jusqu'à sa mort ; ce testament est fait suivant les formalités de la province de Québec, où il avait son domicile, et par la loi de New-York, tout testament fait dans cet état, suivant la loi du domicile du testateur, est légal ; les défendeurs nient aussi que le testament a été exécuté dans l'État de New-York. Les conclusions demandent le renvoi de l'action.

Tous les faits qu'il était nécessaire de prouver à l'appui de cette contestation ont été admis.

A cette action se sont portées parties intervenantes.

1o. W. Russell Ross, se disant un parent pauvre du testateur ; 2o. le Morrin College ; et 3o. le Finlay

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Asylum, alléguant qu'ils étaient des institutions charitables, (*public charities*) suivant l'intention du testateur, pour soutenir la validité du testament.

Le droit des intervenants a été contesté par la demanderesse et le défendeur, qui ont allégué quant au Morrin Collège qu'il n'était pas une institution charitable suivant l'intention du testament, et quant au Finlay Asylum que ce n'était pas une institution publique charitable, et quant à W. Russell Ross, le dit Frank Ross disait avoir déjà exercé à son sujet la discrétion qui lui était laissée par le testament, en l'excluant de la participation du legs pour les motifs qu'il a indiqués.

La cause présente pour la décision de cette cour, les questions suivantes :

1o. Validité du testament de James G. Ross, fait à New-York.

2o. Les legs qu'il contient en faveur des institutions charitables et des parents pauvres du testateur, est-il valable ?

3o. S'il est nul, à qui doivent revenir les biens légués, aux héritiers du testateur, ou à son légataire, Frank Ross ?

4o. Les intervenants avaient-ils un intérêt suffisant pour justifier leur intervention dans la cause ?

Le testament ayant été fait en 1865, c'est à la loi antérieure au code civil de la province de Quebec qu'il faut recourir pour en décider la validité. Le testament étant dans la forme olographe, sa validité doit être décidée d'après les principes de l'ancien droit français qui était alors en force dans la province de Quebec.

L'Honorable Sir Alexandre Lacoste, juge en chef, a discuté dans ses savantes notes sur cette cause, les opinions les plus en vogue parmi les auteurs qui ont écrit sur le droit des gens et traité de la validité des testaments faits à l'étranger. D'après les uns, le testa-

ment n'est valide que s'il est fait selon les formalités requises par la loi du lieu de sa confection, d'après la maxime *locus regit actum*. Une autre opinion veut qu'il soit fait suivant la loi du domicile du testateur. La troisième, qui est la plus généralement adoptée, dit-il reconnaît tous les testaments faits en la forme requise, soit là où se trouve le testateur, soit en celle de son domicile.

Après avoir passé en revue ces diverses opinions et cité beaucoup d'arrêts l'Hon. Juge en arrive à la conclusion que la maxime *locus regit actum* régissait le territoire assujetti à la coutume de Paris et que d'après notre droit en 1865 le testament fait à l'étranger par une personne domiciliée dans le Bas-Canada devait être fait suivant les formes du lieu où il était passé à peine de nullité.

Le droit ancien a été reproduit dans l'article 7 de notre code civil qui se lit comme suit :

> Les actes faits ou passés hors du Bas-Canada sont valables, si on y a suivi les formalités requises par les lois du lieu où ils sont passés.

On a soutenu à l'argument que les testaments olographes n'avaient pas de forme. Certains auteurs ont émis cette opinion. Cependant, le grand nombre est d'un sentiment contraire et la jurisprudence se déclare dans leur sens.

> En nous référant à notre code civil, dit l'Hon. Sir A. Lacoste, nous trouvons que l'article 842 qui a trait aux conditions exigées pour la validité des testaments en général et du testament olographe en particulier se trouvent sous la rubrique " De la forme des testaments." Comme le dit Pothier, la forme du testament olographe consiste dans le fait qu'il doit être écrit en entier par le testateur, et signé par lui.

Quelle est, d'après la loi de l'État de New-York, la validité du testament de James G. Ross fait à New-York en 1865 ? Si ce testament eût été fait par un résident de l'État, il serait nul, comme n'ayant pas été attesté par deux témoins. Mais l'art. 2611 du code de procédure de

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cet État, permettant aux étrangers de faire un testament suivant les formes du pays de leur domicile, ce testament est légal en vertu de cette disposition introduite en faveur des étrangers. Ce testament, entièrement écrit de la main du testateur et signé de lui, se trouvant en la forme olographe conformément à la loi en force, lors de sa date, dans la province de Quebec, est par l'exception de l'art. 2611 de la loi de New-York, en faveur des étrangers, reconnu valable comme le testament d'un étranger, autorisé par cette loi à se servir de la forme de testament de son pays. C'est comme si la loi de New-York avait admis spécialement la forme olographe en faveur des étrangers, et, en ce sens, c'est par application de la règle *locus regit actum*, que ce testament doit être considéré comme valable. Ce testament quoique valable ne peut cependant pas avoir le même effet partout. S'il devait être invoqué dans l'État de New-York, il ne pouvait avoir d'effet que par rapport aux meubles comme étant fait suivant la forme du domicile du testateur. Mais n'étant pas exécuté en présence de deux témoins, il n'aurait aucun effet quant aux immeubles situés dans l'État de New-York. Cependant sa validité comme testament fait d'après la loi du pays où il a été exécuté (à New-York) n'en est pas affectée ; l'effet seul en est limité suivant la loi du pays où il est invoqué.

Mais dans la province de Québec il doit être considéré quant à ses effets comme testament fait d'après la loi en force ici, et produit tous les effets que la loi en force lui donne.

On doit de plus, l'interpréter conformément à l'art. 8, code civil reproduisant l'ancien droit, qui veut que

les actes s'interprètent et s'apprécient suivant la loi du lieu où ils sont passés, à moins qu'il n'y est quelque loi à ce contraire, que les parties ne s'en soient exprimées autrement ou des autres circomstances, il n'apparaisse que l'intention n'ait été de s'en rapporter à la loi d'un

autre lieu ; auxquels cas, il est donné effet à cette loi ou à cette intention exprimée ou présumée.

Le testament ayant été fait en vertu d'une disposition spéciale de la loi de New-York, permettant à l'étranger de tester d'après la loi de son domicile, ce testament doit avoir tout l'effet qu'il aurait eu s'il eût été fait dans la province de Québec. Au lieu de n'avoir effet que pour les meubles comme s'il était invoqué à New-York, il doit, au contraire, dans Québec, s'appliquer à toute espèce de biens, soit meubles, soit immeubles. En outre, l'intention évidente du testateur était de s'en rapporter à la loi de son pays, comme le prouve l'étendue des termes du testament par lequel il lègue tous ses biens sans distinguer entre ses meubles et ses immeubles. Cette intention résulte également des circonstances établies dans la cause. Le testateur n'était que de passage à New-York. Sa fortune se trouvait presque toute entière dans la province de Quebec. Il a de suite envoyé son testament à son frère à Québec. Se l'étant ensuite fait remettre, il l'a gardé en sa possession dans la province de Québec jusqu'à son décès.

Je crois pour toutes ses raisons que le testament doit avoir l'effet d'un testament olographe, comme s'il avait été fait dans la province de Québec quoique fait à New-York.

Quant à la validité des legs faits par le testament j'ai le regret de différer d'avec l'Hon. Sir A. Lacoste au sujet des interventions du Morrin College, et de W. R. Ross comme parent pauvre.

Le Morrin College n'est pas une institution de charité. C'est uniquement une maison d'éducation. S'il est vrai d'après quelques auteurs, que quelques-unes de ces maisons puissent être considérées comme des institutions de charité, il n'en peut être ainsi du Morrin College. C'est uniquement une maison d'éducation

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dont l'emploi des revenus est appropriée d'une manière si exclusive à l'éducation qu'elle ne pourrait, sans violer les conditions de sa charte, employer partie de ses fonds en charité. Cet emploi est réglé par la sec. 7eme de son acte d'incorporation de manière à lui enlever toute possibilité de se prétendre une institution charitable. Voir Acte d'incorporation du College Morrin, sanctionné 18 Mai, 1861. (24 Vic. c. 109.)

7. All the property at any time belonging to the said corporation, and the revenues thereof, shall at all times be exclusively applied and appropriated to the advancement of education in the said college, and to no other object, intentions or establishment whatsoever unconnected with or independent of the same.

Le Morrin College ne pouvait devenir une institution de charité n'a pourtant point qualité pour accepter un legs en cette qualité ni pour intervenir dans cette cause pour soutenir la validité du testament.

Le legs aux parents pauvres est aussi nul pour cause d'incertitude. Que doit-on entendre par l'expression " poor relations " (parents pauvres) ? Sont-ce les parents aux degrés successibles, ou seulement tous ceux qui pourraient tracer leur descendance d'un ancêtre commun, qui doivent être compris dans ce legs ? Ces parents pauvres ne sont aucunement désignés et ne pourraient être reconnus par aucun événement indiqué par le testateur ; l'expression vague et incertaine dont le testateur s'est servi rend leur identification impossible et doit être rejetée.

Cependant, dans tout legs il y a deux conditions indispensables, une chose léguée, et une personne à laquelle la chose est léguée. Sur ces deux points la loi requiert que le testateur s'explique avec certitude. Le legs pour être valide doit être l'expression de la volonté du testateur ; le legs ne peut pas dépendre de la volonté d'un tiers, ni le choix du légataire être laissé à une tierce personne ; agir ainsi, ce ne serait pas exercer

le pouvoir accordé par la loi de disposer par testament, mais plutôt transférer ce pouvoir à une tierce personne. Pothier, Donations testamentaires, pose ainsi la règle :

No. 73. Une disposition testamentaire est nulle par vice d'obscurité lorsqu'on ne peut absolument discerner quel est celui au profit de qui le testateur a voulu la faire. No. 78. De même que pour la validité du legs il faut qu'on puisse connaître à qui le testateur a voulu léguer, il faut aussi qu'on puisse connaître ce qu'il a voulu léguer, autrement le legs est nul, selon cette règle, *quae in testamento ita scripta sunt ut intelligi non possint, permissi sunt ac si scripta non essint.* L. 73 et 1er, ff de Reg. jur.

Troplong (1).

La certitude de la personne gratifiée est une des premières conditions de toute libéralité. La raison donnée par Caius se résume dans ces paroles : " *Incerta autem videtur persona, quam per incertam opinionem, animo suo testator subjicit.*" Le testateur n'a eu aucune idée précise de la personne gratifiée ; il n'aurait rien dit de positif.

Cette autre règle du droit romain " *in alienam voluntatem conferri legatem non potest*, a été adoptée dans notre code, art. 756.

7 Aubry & Rau (2).

Les dispositions testamentaires doivent être faites en faveur de personnes certaines. Si elles étaient faites au profit de personnes incertaines, elles seraient à envisager comme non avenues.

On entend par personnes incertaines celles dont l'individualité n'est ni actuellement déterminée, ni même susceptible de l'être par l'arrivée de quelque événement indiqué dans le testament.

Les dispositions testamentaires doivent être l'expression directe de la volonté du testateur. De ce principe résultent deux conséquences suivantes :

(*a*) Le testateur ne peut faire dépendre l'existence même d'un legs, du pur arbitre *meram arbitrium* de l'héritier ou d'un tiers.

(1) Don. et Test. vol. 2, 517-18. (2) P. 69, ss. 655 and 656.

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(*b*). Le testateur ne peut faire dépendre l'effet d'un legs en ce qui concerne la désignation du légataire du choix de l'héritier ou d'un tiers. En d'autres termes, il ne peut conférer à qui que ce soit la faculté d'élire, c'est-à-dire de choisir soit indéfiniment, soit parmi plusieurs individus indiqués au testament, la personne qui devra profiter du legs (1).

Demolombe dit comme suit : (2)

Nous croyons qu'il faut entendre par personnes incertaines celles dont l'acte même de disposition ne détermine pas actuellement l'individualité et n'indique non plus aucun moyen aucun événement par l'accomplissement desquels elle pourrait être plus tard déterminée.

Puisqu'il faut que le légataire soit désigné par le testament lui-même, le testateur ne saurait confier à l'héritier ou à un tiers le soin de le désigner : et voilà comment la faculté d'élire se rattache à la théorie des personnes incertaines.

Voir aussi Merlin *in re Jean Merendol* (3) ; Merlin (4) ; Rej : 12 août 1811, Cass. Affre. Lauglier et Héritiers Merendol (5) ; Rej : 3 mars 1857, Cass. *Héritiers de Sauvan* v. *de Saurieu* (6) ; Arrêt, C. d'Appel de Colmar. Affre. *Mœglin* v. *Willig*. 22 mai 1850 (7).

Considérant que le testament doit être l'expression de la volonté du testateur, fixé sur une personne certaine, et ne saurait être par suite subordonné à la volonté d'un tiers, que le légataire doit être clairement désigné etc.

Arrêt Cour d'Appel de Douai, 15 Déc. 1848, *Detève* v. *Detève* (8) ; Arrêt C. Royale de Bordeaux 6 mars 1841, *Laboujouderie* v. *Raffier* (9) ; Rej. Cass. 8 août 1826. *Legrand Masse* v. *Lepine* (10) ; Cass. 28 mars

(1) 5 Toullier, nos 350, 351, 606 ; 3 Zachariæ (Massé & Vergé) p. 34, note 2.
(2) Vol. 18 no. 608 et 618.
(3) Rép. vo. Lég. par. II, vol. 16, p. 425 [éd. Belge].
(4) Rép. vo. Institution d'Héritier, s. V., par. 1, no. XVIII, vol. 15, p. 367 [éd. Belge].
(5) S.V. 11, 1, 391.
(6) S.V. 57, 1, 182.
(7) S.V. 52, 2, 435.
(8) S.V. 49, 2, 538.
(9) S.V. 41, 2, 240.
(10) S.V. 27, 1, 409.

1859. *Beurier* v. *Emorine* (1). Rep. Cass. 30 nov. 1869. *Britelle et al.* v. *Deyvrande* (2); *Simon* v. *Simon* (3).

D'après l'énoncé de ce jugement, on voit que la certitude sur la personne de légataire est une des premières conditions de la validité de tout legs. Tout legs fait à une personne incertaine doit être considéré comme nul. Les personnes incertaines sont celles dont l'individualité n'est pas déterminée par le testament ni susceptible de l'être par l'événement de quelque condition indiquée dans le testament. Il suit de là que la validité du legs ne peut dépendre de l'arbitraire de l'héritier ou d'un tiers, et que le testateur ne peut non plus en ce qui concerne le choix du légataire, le faire dépendre du choix de l'héritier ou d'un tiers.

L'Hon. Juge qui a décidé en première instance a énoncé dans sa savante dissertation sur cette cause, les principes souvent formulé, ainsi qu'il suit:

1st. It is the certain policy of our law and my clear duty to give effect to the whole will of the testator unless prevented by insuperable difficulties. 2nd. If the will had not contained the words giving Mr. Frank Ross a discretionary power as to the selection of the particular individual bodies and persons to be benefited, but had simply said that he should give one half of the estate to the public protestant charities of Quebec and Carluke and to poor relatives, I think the law would imply that the distribution between them be an equal distribution. 3rd. I think that if Mr. Frank Ross shall refuse or neglect to exercise the discretion vested in him by the will, the courts here should not allow such refusal or neglect to defeat the testator's bequest; but as the court lacks the special knowledge which Mr. Frank Ross presumably has of what would have been the distribution which the testator would have wished, it would make no endeavour to exercise any discretion or discrimination beyond that pointed out by the lines of the will itself and would therefore distribute the testator's bounty equally among all the individuals composed in the category or class of beneficiaries therein designated.

Le premier de ces principes est admis. Il n'en est pas de même de deux autres. Il n'est certainement pas

(1) S.V. 60, 1. 346. (2) Dalloz, Recueil 1870, 1, 202.
(3) Journal du Palais 1827, 132.

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correct de dire que si le testament n'avait pas donné à Frank Ross le pouvoir de faire lui-même la distribution, elle aurait lieu par parts égales d'après la loi ; et que dans le cas où il refuserait d'exercer les pouvoirs qui lui sont conférés la cour en ferait la distribution. Cette distribution égale ne peut avoir lieu qu'entre successibles au même degré, mais entre parents à différents degrés les plus proches excluent les plus éloignés. Si Frank Ross décédait sans avoir fait la distribution la cour ne pourrait en ordonner une distribution égale entre les parents, car les tribunaux dans la province de Québec ne possèdent aucun pouvoir à cet égard. La 34 Geo. 3, tout en conférant à la cour du Banc du Roi remplacée par la cour Supérieure, la juridiction de la Prévôté de Paris, a cependant déclaré qu'aucun pouvoir législatif possédé par aucune cour avant la Conquête n'était transféré à la Cour du Banc du Roi.

La cause du testament de *Dame Anne &c., Beauvoisin* (1), citée dans le factum de l'appelant, qui avait laissé le résidu de ses biens aux pauvres honteux qui seront choisis par les exécuteurs testamentaires se rapportant au choix des pauvres à leur discrétion, est une de ces causes où les cours par l'exercice de leur pouvoir législatif substituait leur volonté à celle du testateur. C'est en vertu de ce pouvoir que la cour ordonna que la moitié du résidu des biens serait divisée entre les héritiers suivant l'ordre dans lequel ils auraient succédé si la succession avait été *ab intestat* et l'autre moitié à l'Hôtel-Dieu de Paris et aux pauvres de l'aumône de Lyon. Quoique cette distribution soit contraire au testament on voit cependant que dans la moitié attribuée aux parents, la cour a suivi l'ordre de succession. Il en doit être de même dans le cas d'un legs faits aux pauvres parents. C'est l'ordre de succession qu'il faudrait suivre. D'autres causes de ce genre sont citées,

(1) Ricard n° 589.

mais elles sont comme celle-ci, fondées sur l'exercice du pouvoir législatif de ces cours.

Maintenant en France les legs faits aux pauvres ou pour des fins de charité sont considérés comme faits au bureau de Bienfaisance de la Commune. Nous n'avons aucune institution de ce genre dans notre province. Parmi les nombreuses institutions de charité existant dans le pays, aucune n'est autorisée par la loi à réclamer et administrer les legs présumés faits par ces objets.

Considérant le legs fait aux parents pauvres comme absolument nul pour cause d'incertitude, je suis d'avis que W. R. Ross n'avait aucun droit d'intervenir dans la présente cause et que son intervention doit être renvoyée.

Le jugement doit aussi être modifié dans cette partie qui condamne le défendeur Frank Ross à remettre et livrer à la demanderesse un neuvième indivis des biens de la succession située en dehors de la province de Québec, savoir dans la province d'Ontario, New Brunswick, la Colombie Anglaise, et les Etats-Unis, parce qu'il n'est pas prouvé que le dit défendeur en ait jamais eu possession ; cette partie du jugement doit être retranchée ; en outre, la cour n'avait aucune juridiction pour décider sur l'effet de ce testament dans les provinces ci-dessus nommés. Le testament attaqué doit être déclaré bon et valide, et l'action renvoyée avec dépens ainsi que les interventions du Morrin College et de W. R. Ross, aussi avec dépens.

TASCHEREAU J.—I dissent, I would allow the appeal. There is, however, one of the questions of law arising in the case upon which I agree that the conclusion reached by the judgment appealed from is entirely correct. That is, as to the absolute nullity of Ross's will by the law of the province taken alone and ex-

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clusively of the New York statute. The learned Chief Justice, Sir Alexander Lacoste, has so amply demonstrated the soundness of the doctrine unanimously adopted by the Court of Queen's Bench on this part of the case, that I would have thought it unassailable. The respondent, however, not quite sure perhaps of his position on the other question in the case, to which I shall presently refer, upon which he succeeded before the Court of Queen's Bench in having the will in question maintained, has strenuously argued before us, as he had a perfect right to do, that this will is valid by the law of the province independently of the New York law, and that the Court of Queen's Bench's judgment to the contrary is erroneous. Under the circumstances, though I feel that I cannot add anything to the strength of the reasoning of the learned Chief Justice of the Court of Queen's Bench, I have thought that the respondent was entitled to expect at our hands a full review of the question.

It is a general rule, in relation to forms of acts or deeds, that forms prescribed merely for the purpose of facilitating the solemnization of an act or deed are facultative or optional, but that forms necessary to their validity, as those for wills all are, must imperatively be complied with. In accordance with this principle, besides other reasons, the jurisprudence was uniform in France, before the Code Napoleon, that the rule *locus regit actum*, re-enacted by art. 7 of the Quebec code, imperatively governed wills made in foreign countries, including holograph wills.

Laurent (1), answers the opinions expressed to the contrary by the German writer Savigny, and a few others whom Wharton, Conflict of Laws, 585-588, 681, calls modern Roman jurists, upon whose writings the respondent has almost exclusively to rely in support of

(1) Dr. Intern. par. 259, vol. 2.

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his impeachment of the conclusion reached by the court of Queen's Bench on this point. Not a single case has been cited by him in support of his contention. On the contrary, I find that as far back as in 16-0, in a case of *Pinard* v. *Andras* (1), the Parliament of Paris held that a holograph will made in Bruxelles by a Frenchman domiciled in Paris was absolutely null because the Belgian law did not allow that form of will. The same doctrine was followed by the same high court in 1720, in the case of *d'Argelos* (2), in 1721 in the case of *Pommereu* (3), and in 1722 in the case of *Boisel* (4). These cases are all noted, with an *acte de notoriété*, in the same sense, *re Paulo*, in Guyot (5), where the author adds, page 166, that—

It cannot be seriously contended that the formalities required by law for a will are personal and are carried with the person everywhere.

The Pommereu case, reported at length in 7 Journal des Aud. 515, commented upon by Merlin (6), is precisely in point. The will there in question had been made in the holograph form by a testator whose domicile was in Paris, while he was temporarily in Douay where holograph wills were not legal. The argument in support of the will was, as it is here on the part of the respondent, that as it was in the form allowed by the testator's domicile it was valid; that the testator carried everywhere with his person the right to make a holograph will; that the contrary doctrine is irrational and inconvenient; that a holograph will has no forms, &c., &c.

Against the will it was argued that a will null by the law of the place where it was made is null everywhere even if made according to the law of the testator's

(1) 17 Guyot Rep. 167-8.
(2) 7 Jour. Aud. 520.
(3) 7 Jour. Aud. 515.
(4) 7 Jour Aud. 689.
(5) Rep. vo. Testament.
(6) Rep. vo. Testament.

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domicile; that it is an error to say that the option to make a will either in one form or in another is attached to the person and carried with the person everywhere.

The question, it will be seen by this short extract of the report of the case, was fully argued on both sides, and the result was, as stated, that the highest court of the Kingdom declared the will null.

In another case, *re Millot*, on the 15th July 1777, a holograph will, made in Paris by a testator domiciled in a place where such wills were not legal, was held valid. And on the 15th Pluv. and 20th August 1806, by two *arrêts*, a will made in Bordeaux where holograph wills were not legal, by a testator domiciled in Paris where such wills were legal, was declared void. The leading commentators under the old system adopted the same doctrine.

Auzanet, on art. 289 of the Coutume de Paris, says :—

> What of a will by a Frenchman in Italy, in England, in Spain or any other foreign country in the form required by the *lex loci*? Held that it is valid, even for the properties situated in France. And if the will is not made according to the form required by the law of the country where it is made, it must be declared null, even if it is made in conformity with the laws of the country where the property devised is situated, and that as to immovables as well as to movables.

"The formalities for a will," says Bourjon (1), "are those required by the law of the place where it is made." And Ricard (2), says that the question whether it is *lex domicilii* or the *lex loci* or the *lex rei sitæ* which is to govern the formalities of a will had formerly been a subject much discussed, but that it is now settled by a uniform jurisprudence that the formalities must exclusively be those required by the law of the place where the will is made.

Troplong (3), answers what Ricard says to the contrary in another part of his writings which is also

(1) 2, 305.

(2) Donat. 1er no. 1286.

(3) Donat. no. 1737.

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commented upon in the Pommereu case I have referred to. Ferrière, Grand Coutumier (1), Rosseau de la Combe (2), Furgole (3), all adopt the same doctrine, and recognize that the law is authoritatively settled in that sense.

In France, now, under art. 999 of the Code Napoleon, and in Louisiana under art. 1588 of their Code, a holograph will, according to the French form, made in a foreign country is valid whether the law of that foreign country authorizes it or not, but that provision is no where to be found in the Quebec Code. That it has been deliberately left out there can be no doubt. The drafters had constantly before them in the course of their labours the enactments of those two Codes, and they did not adopt a single article without maturely weighing the changes thereby made in the law and closely scrutinizing their corresponding enactments, yet they entirely omitted this provision that a holograph will may be legally made anywhere.

This, to my mind, is as conclusive on the question as if the code had decreed expressly that a holograph will cannot be made in any foreign country where such a form of will is not allowed, and that such had always been the law in the province.

A reference to the leading commentators under the Code Napoléon also supports that view.

Marcadé (4), says:

C'est uniquement la loi du pays où l'acte se fait qui doit en régir la forme, *locus regit actum*. D'après ce principe un français ne pourrait tester valablement en la forme olographe que sur le territoire français ou dans un pays dont la loi admettrait également cette forme de tester. C'est ce qui a eu lieu jusqu'à la publication du Code.

And he adds that it was generally admitted by the best commentators and by a uniform jurisprudence.

(1) On art. 289 Coutume de Paris vol. 4, p. 131 *et seq.*

(2) Vo. Testament, p. 706.

(3) Vol. 1, p. 69.

(4) Vol. 4, p. 61 on art. 999.

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under the old system, that a holograph will made in a country where that form is not known to the law, was invalid. Coin-Delisle (1), and Demante (2), are of the same opinion. I refer also to Journal du Droit International Privé, 1880, p. 381 ; Dalloz (3), says in the same sense :

> Il en est du lieu comme du temps ; c'est la loi du lieu où le testament a été passé qui règle les formalités de cet acte. De là l'adage si connu, *locus regit actum*. No. 2507. L'application de la règle *locus regit actum* aux testaments olographes était quelque peu contestée sous l'ancienne jurisprudence. * * * Mais l'opinion de Bouhier et de Ricard ne prévalent pas. Furgole * * et Pothier * * * soutinrent l'opinion contraire. * * * Ces auteurs concluaient que le testateur quelle que fût d'ailleurs sa loi personnelle, était capable ou incapable de tester par testament olographe, suivant que cette forme était ou non admise dans le lieu où le testament se trouvait écrit. Cette théorie a été consacrée par quatre arrêts de parlement du 10 mars 1620, 15 janvier 1721, 14 juillet 1722, 15 juillet 1777, par un acte de Notoriété du Châtelet, du 13 septembre 1702, et appuyée de l'autorité de Merlin. Ces arrêts avaient fixé la jurisprudence d'une manière invariable, et il ne restait de dissidence dans la doctrine que l'opinion contraire de Boullenois, opinion influencée par une extension systématique et évidement exagérée des principes de l'auteur sur les statuts. No. 2508. Le Code Napoléon ne s'est occupé de la maxime *locus regit actum* que pour la confirmer comme il l'a fait par l'article 999 à l'égard du testament authentique tout en la modifiant à l'égard du testament olographe accomplis l'un et l'autre par un français en pays étrangers.

Demolombe (4), says :

> Il est vrai que l'article 999 autorise le Français à faire un testament olographe suivant la forme française dans les pays mêmes où cette forme ne serait pas admise ; mais c'est là une exception que la loi française a faite en faveur des Français, afin de leur donner le plus de moyens possibles de faire leur testament en pays étranger ; exception de faveur, disons-nous, qui ne prouve nullement que les auteurs du Code aient méconnu le vrai caractère de la loi qui autorise cette forme de testament.

(1) Donat. et Test., on art. 999.
(2) Vol. 4, p. 301.
(3) Rép. vo. Dispositions, entre-vifs et testamentaires, no. 2506.
(4) Vol. xxi, nos. 482-3 p. 453.

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The same author then discusses the assertion of Fœlix and Aubry and Rau that the rule *locus regit actum* is facultative so as to permit the execution of the will either according to the law of the domicile or according to the law of the place of execution, and adds (1) :

Cette doctrine, sans doute, pourrait paraître raisonnable, et nous sommes en effet porté à croire qu'elle serait, si elle était admise, un progès du droit nouveau sur l'ancien droit. Mais il faut reconnaître que l'ancien droit ne l'avait pas admise ; et nous avons aussi constaté ailleurs qu'elle n'a pas encore non plus réussi à se faire reconnaître dans notre droit nouveau.

At par. 482, in fine, the author says that the doctrine in France before the Code had almost universally prevailed that a holograph will made in a country where that form of will is not recognized, is a nullity, even if the *lex domicilii* of the testator recognized it. And at par. 106 *bis* vol. 1, p. 129 the same author says :—" Is the rule *locus regit actum* imperative or merely facultative ? " The question was under the old law much discussed, but, however, the opinion that it was imperative had prevailed. And such is the tendency of our modern jurisprudence.

Laurent (2), says :—

La dérogation est claire, mais quelle en est la portée ? En faut-il conclure que la forme des testaments olographes est un statut personnel ? On l'a prétendu et nous verrons à l'instant que cette question de théorie a un intérêt pratique. Il nous semble que la difficulté n'en est pas une, car les principes les plus élémentaires sur l'interprétation des lois suffisent pour la décider. Que la loi qui règle les solennités d'un acte ne soit pas une loi personnelle tout le monde en convient ; l'opinion de Boullenois et de Bouhier est toujours restée isolée. L'article 999 en dérogeant à l'adage, *locus regit actum*, a-t-il changé la nature des lois concernant les formes ? Il a permis au Français de faire un testament olographe d'après la loi française dans les pays où cette forme de tester ne serait pas admise. Toute exception doit être renfermée dans les limites de la loi qui l'a établie. L'exception de l'article 999 se borne à accorder à un Français une faculté qu'il n'avait pas en

(1) Dem. vol. xxi, no. 484, p. 454.

(2) Dr. Civ. vol. xiii, p. 166, no. 159.

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vertu du droit commun, voilà tout. Le statut reste donc ce qu'il était, un statut réel.

The same writer at par. 245 *et seq.* vol. 2, droit international, repeats the same doctrine. Also in vol. 1 droit civil 90 *et seq.*, and in vol. 6 droit intern., nos. 415-922, he says of art. 999, Code Napoleon, that the Code has deviated from the old law on the subject and inaugurated a new principle. In vol. 7 dr. intern. nos. 5 *et seq.*, are other remarks of the same writer in the same sense.

Aubry and Rau (1), though of opinion that the rule *locus regit actum* is merely facultative and not imperative, concede that under the old law the rule was held to be imperative. That it is facultative under art. 999 of the Code Napoleon is unquestionable, but I repeat it, that it is not and never has been law in the province of Quebec; and Boileux (2) says:—

> Under the jurisprudence anterior to the code it was generally admitted that a Frenchman could not validly make a holograph will in a country where that form of will was not legal.

I refer also to the decisions in *De Veine* v. *Routledge* (3); to the same case in Cassation (4), and to 3 Troplong (5), where it is said that the opinion of Ricard and others to the contrary did not prevail in France before the Code

As to the contention faintly urged on the part of the respondent, that the fact that holograph wills have no form and that they need not be dated from any place shows that they can be made anywhere, I need only say that it is one that was propounded long ago by Ricard *inter alios*, whose opinion is so often wrong, says Troplong, no. 1463, but has never been sustained by any court, and is repudiated expressly by the judg-

(1) Vol. 1, p. 112.
(2) Vol. 4, p. 122.
(3) S. V. 52, 2, 289.
(4) S. V. 53, I, 274, sub. nom. *Browning* v. *de Nayve*.
(5) Donat. nos. 1736 *et seq.*

ment in the Pommereu case (1), to which I have already referred, where that same point had been explicitly taken, and Merlin calls it a "subtilité." The respondent contends that the rule *locus regit actum* is absurd and irrational. That may or may not be. Laurent (2), and Despagnet (3), think that it is the English rule that is absurd. With this, however, clearly we are not concerned.

For these reasons I agree with the Court of Queen's Bench (and we are unanimous on this point I understand, though I have not seen my learned colleagues' opinions), that under the law of the province, considered alone and without reference to the New York law, Ross's holograph will made in New York is void.

The Court of Queen's Bench, however, have maintained the validity of that will upon the ground that it was made according to the form required by the law of New York and consequently valid under art. 7 of the Quebec Code and the rule *locus regit actum*. Now as a matter of fact alone, upon the evidence in the record, I would say that this will is not made according to the forms required for wills in New York. The experts examined all agree that holograph wills are unknown to the New York law. That should put an end to the controversy. But the conclusion reached by the Court of Queen's Bench on this branch of the case is based upon art. 2611 of the New York Code of Procedure by which it is decreed that:

A will of personal estate, executed by a person not a resident of the state according to the laws of the testator's residence, may be admitted to probate.

Therefore, they say, Ross's will is made in the New York form as to personal estate.

I am unable to adopt this reasoning. It rests entirely, it seems to me, on a misconstruction or mis-

(1) 7 Journal Aud. 515.
(2) 7 Dr. Intern. 10 *et seq.*
(3) Journal De Dr. Intern. prive 1890.

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application of the New York statute. (I cite here the cases of *Bremer* v. *Freeman* (1), *Concha* v. *Murrietta* (2), and *City Bank* v. *Barrow*, (3), as to the construction of a foreign code.) The granting of the probate of a will made under a foreign law is not conclusive and does not regulate and affect the ultimate destination of the property; Jarman, (4); *In re Kirwan's Trusts* (5); *Barnes* v. *Vincent* (6); *Abston* v. *Abston* (7); *Atkinson* v. *Rogers*, (8); and ancillary probate may be granted of a will made according to the laws of the foreign domicile of the testator though that will is invalid according to the *lex fori* (9).

In *Thornton* v. *Curling* for instance, reported in England in 8 Sim. 310, and in France in Journal du Pal. 1826, 898, commented upon by the Vice Chancellor in *Price* v. *Dewhurst* (10), the will there in question had been made in England, in the English form, by a testator domiciled in France. That will was null according to English law, because not in the form required by the law of the testator's domicile. Yet it was admitted to probate in England, 2 Addams, 6, because it was valid as to form in France according to the rule *locus regit actum*, though eventually the Cour de Cassation in France held its dispositions illegal under the French law. And such a course of dealing would be followed under the same circumstances in New York, I apprehend, as by art. 2624 of that same code, it is only of wills made in the State by residents of the State that the Surrogate determines the validity. By art. 2694 it is expressly enacted that the validity of a will of any personal

(1) 10 Moo. P.C. 306.
(2) 40 Ch. D. 543.
(3) 5 App. Cas. 664.
(4) Vol. 1, 5th Eng. ed. 5.
(5) 25 Ch. D. 373.
(6) 5 Moo. P.C. 201.
(7) 15 La. An. 137.
(8) 14 La. An. 633.
(9) Jarman p. 5 *et seq.*
(10) 8 Sim. 300. Robertson on Succ. 287.

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property situated within the State is regulated by the laws of the State or country of which the decedent was a resident at the time of his death. It is only to personal estate in New York that this article can have any application, and it is likewise only to personal estate in New York that art. 2611 is intended to apply. It cannot, it is evident, have any application in the courts of any foreign country.

The form that, under art. 7 of the Quebec Code declaratory of the old law, has to be followed by a Quebecer who makes a will in New York, is the form required by the law of New York for wills by its own subjects, the form generally used in New York, as the last part of art. 999 of the Code Napoleon reproducing the rule *locus regit actum* expresses in clear terms. And the New York Legislature had not the power to alter that law for the province of Quebec, and to decree that a Quebecer could in New York make his will either according to his *lex domicilii* or to the *lex loci actus*, or to neither one nor the other, but according to a mixture of both, at least so as to affect movables in Quebec.

It cannot be that the legislature of New York had the right to pass a statute in the following terms: "Whereas by the law of the province of Quebec a holograph will made in New York by a citizen of the province is invalid in Quebec; whereas it is expedient to provide otherwise; it is hereby decreed that hereafter such a will shall be valid." Could such an enactment affect property in Quebec? I would say not, and the New York legislature never intended to do so. To give to their statute the meaning that the respondent contends for would be to extend it in a manner not justified by any principle of law that I know of.

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The respondent, in other words, would argue, at least his argument leads to it, that though the legislature in Quebec has refused to adopt the change in the law made in this respect as to holograph wills by art. 999 of the Code Napoleon or by art. 1588 of the Louisiana Code, yet the New York legislature has done it for them.

To so contend is evidently to forget the sovereignty of the province and of the law of the domicile of the testator in the matter and leads to a reasoning in a circle. And a safe rule that I would apply here is the one laid down by Lord Penzance in a somewhat analogous case, *Pechell* v. *Hilderly* (1) that in determining the question whether such a will is valid or not, regard can be had to the law of one country alone at a time and the court will not mix up the legal precepts of different countries. The law of Quebec is exclusively the rule here. But were it necessary to make the inquiry, it seems to me established in the case that the will would be held invalid in New York.

Mr. Adams, one of the experts examined in the case, makes this point clear and I do not see that he is contradicted by the other experts. As in England, in matters of testate succession, when the will has been made by a person dying with a foreign domicile, inquiry is made in New York, I assume, with regard to the validity of that will by the law of the domicile and according to the result of such inquiry, probate of the will is granted or rejected. Art. 2694 New York Code of Procedure (2).

Upon evidence that by the Quebec law a holograph will made in New York by a citizen of Quebec is not valid in Quebec to transmit property real or personal situated or to be found in Quebec if, by the New York

(1) L.R. 1 P. & D. 673.

(2) Robertson on Success. 26 ; *Abd-ul-Messih* v. *Farra* 13 App. Cas. 431.

law, holograph wills by citizens of New York are not valid in New York, this will in question here would not be admitted to probate in New York.

This art. 2611 of the New York Code of Procedure does not cover this will as it applies only to a will of personal property executed by a person not a resident of the State according to the laws of the testator's residence. And Ross's will is not executed according to the laws of the testators's residence.

It was said at the argument on the part of the respondent, this will is good by the Quebec law, it is also good by the New York law, why should it not be upheld? This is, however, but an assumption of the very question at issue. That is precisely what has to be determined, whether this will is valid or not; and to such an argument the appellants have only to answer, with not more but with as much force, by saying that as the will is bad in Quebec, and also bad in New York, it cannot be upheld. If Ross had left personal estate in New York, and the New York Court upon contestation of his will had referred the question of its validity to the Quebec courts, following the course adopted by the Prerogative Court in England in de Bonneval's case (1), to have the question settled by Ross's *lex domicilii*, the Quebec courts would have had to answer, and the Court of Queen's Bench concedes it, that by Ross's *lex domicilii*, alone and independently of the New York law, the rule *locus regit actum* imperatively governs, and that this will by that law is therefore null; that by the Quebec law a Quebecer, who in New York desires to make a will disposing of either movables or immovables, or both, in Quebec, must do so according to the New York forms. And as a holograph will is not in the New York form, that would have been the end of the controversy, as art. 2694 of the

(1) 1 Curteis 856.

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New York Code of Procedure, above referred to, expressly says that as to personal estate it is by Ross's *lex domicilii* that, in New York, the validity of his will is to be concluded. I utterly fail to understand the import of the rule *locus regit actum*, if it does not mean, adapting it to this case, that a Quebecer who desires when in New York to make a will has to make it according to the form required by the law of New York for its own subjects; or to put it in other words, if a will in the holograph form made by a New Yorker in New York is void under the New York law in New York, a Quebecer's will in that form made in New York is also void in Quebec, which is Ross's *lex domicilii*.

This art. 2611 of the New York Code, relied upon by the Court of Queen's Bench to maintain this will, requires no form at all for any will in the sense that the word "requires" bears in art. 7 of the Quebec Code. It is a mere enabling enactment as to probate when a foreign testator has left personalty in the State of New York. The form that is required by the New York law for New York citizens for a will made in the State of New York is the form derived from the English law of a will before witnesses. All that this article of the Code of Procedure enacts is that a will made by a non-resident of the State of movables to be found in the State may be admitted to probate if made according to the law of the testator's residence. It does not purport to legalize any will otherwise illegal. It merely decrees that probate may be granted in New York, as to personalty, of any will that is legal by the law of the foreign testator's residence. It does not at all help any will, or in any way come to the assistance of any will, that is not perfectly legal by the law of the testator's residence and by that law alone. The fact that Ross's will happens to have been made in New York

does not make the least difference. The article does not merely apply to wills made in New York; it has the same application to a will made for instance in England by a Frenchman domiciled in Paris, or in Paris by an Italian, or to bring the illustration closer to the present case, to Ross's will if it had been made in England. If, under such a will, the testator had disposed of movables in New York, and probate was in consequence demanded in New York, the New York court would grant probate if the will is good by the law of the testator's residence exclusively, and refuse it if the will is bad by that same law. Such is the New York law. In the Marquis de Bonneval's case above cited a Frenchman had made his will in England in the English form. The court in England (1), held that by the English law the validity of that will as to personalty in England had to be determined by the law of France, the *lex domicilii* of the testator, and accordingly referred the case to the French courts to ascertain what that law was. Thereupon the Court of Cassation in France, where the case was eventually carried, determined (2), that, by the French law, that will made in England, irrespectively of the question of the testator's domicile, by a French subject in the English form was good under the common law and art. 999 of the Code Napoleon, which decrees, in express words, that a Frenchman in a foreign country may make his will in the forms recognized (*usitées*) in that country, re-enacting thereby the rule *locus regit actum*, which had always governed in France and which is reproduced in art. 7 of the Quebec Code, as I have already remarked. But if instead of being a will in the English form de Bonneval's will had been a holograph will, the courts in France would unquestionably before the Code have held it utterly void

(1) 1 Curteis 856. (2) S.V. 43, 1, 209.

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as they did for the Pinard Andras, the d'Argelos, the Pommereu and the de Boisel wills, and the other wills in the cases that I have cited.

This enactment of the New York code, art. 2611, upon which the respondent bases this branch of his argument is, it seems to me, nothing more than a re-enactment of the English common law; *Bremer* v. *Freeman* (1); *Croker* v. *The Marquis of Hertford* (2). Now, would Ross's holograph will have been good according to Quebec law if made in England? That is the same question undoubtedly. The law of England, as I have said, is the same as the law of art. 2611 of the New York Code. Would not the courts in France, before the Code Napoleon, have held such a will null, as they did in the above cited cases? Upon an application for probate of Ross's will, if it had been made in England the court in New York would not have proceeded before inquiring what was Ross's *lex domicilii*, and upon ascertaining that by that *lex domicilii* a holograph will made in England by one of its subjects is void, as the English law does not know of holograph wills, probate would have been refused.

The New York article can apply only to wills made by a subject of a foreign country, or of any other State of the Union where the English law on this subject prevails, that is to say where, by the testator's *lex domicilii*, he carries everywhere with his person the right to make a will in the forms prescribed by the law of his own country, a doctrine which, to use Guyot's words in the passage I have cited, cannot be seriously contended for under the French common law. With the law on the subject under the English system there is in the New York law no conflict; with the law under the French system there is conflict.

(1) 10 Moo. P.C. 306.

(2) 4 Moo. P.C. 339.

It has been said that it would be an anomaly if this will was held to be valid in New York and invalid in the province of Quebec. But anomalies of this kind, assuming that the New York courts might uphold the validity of this will, are constantly met with. It is the inevitable result of the differences between the municipal laws of the different countries of the civilized world. In a case of *Guigonand* v. *Sarrazin* (1), for instance, a will made in Austria was declared null by the French courts, though it had been held valid by the Austrian courts. In a case of *Meras* v. *Meras* (2), a holograph will made in France by a Spaniard was held good by the French courts, though it had been held bad by the Spanish courts. And an English subject, temporarily in France, may, by the French law, make a holograph will in France, and such a will will affect both movables as well as immovables situated in France. *Re Quartin* (3); *Meras* v. *Meras* (2). But in England such a will at common law would have been invalid; *Croker* v. *the Marquis of Hertford* (4); *Bremer* v. *Freeman* (5); as to both movables and immovables. And a will in the English form, made in France by an Englishman domiciled in England, is null in France both as to movables and immovables (6). See *Mendes* v. *Brandon* (7). It is good in England as to both. *In re* Rippon (8); *In re* Raffenel, (9); *Doglioni* v. *Crispin* (10). "Attendu," says the Cour de Cassation, in *Re Browning* (6), declaring the nullity of a will in the English form made in France by an Englishman:

(1) Jour. de Dr. Intern. privé, 1877, p. 149.
(2) Journ. de Dr. Intern. privé, 1882, p. 426.
(3) S.V. 47, 1, 712.
(4) 4 Moo. P.C. 339.
(5) 10 Moo. P.C. 306.
(6) 4 Demol. Donat. 484; 6 Laurent Dr. Intern. no. 420: *De-Veine* v. *Routledge*, S.V. 52,2, 289; and in Cassation, *sub nom. Browning* v. *de Nayve*, S.V. 53, 1, 274.
(7) Journ. du Pal., 1850, 2, 187.
(8) 3 S. & T. 177.
(9) 3 S. & T. 49.
(10) L.R. 1 H.L. C. 301.

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Qu'il est de principe de droit international que la forme extérieure des actes est essentiellement soumise aux lois, usages et coutumes des pays où ils sont passés ; que ce principe s'applique aux testaments olographes comme tous autres actes publics et privés. Attendu que si tout ce qui tient à l'état du testateur, à l'étendue et à la limite de ses droits et de sa capacité est régi par le statut personnel qui suit la personne partout où elle se trouve, il en est autrement de la solennité de l'acte et de sa forme extérieure qui sont reglées par la loi du pays où le testateur dispose. Qu'ainsi le testament olographe fait par un étranger en France, et dont l'exécution est demandée devant les tribunaux français ne peut être déclaré valable qu'autant qu'il réunit toutes les conditions de forme exigées par la législation française, quelle que soit à cet égard la législation du pays auquel appartient le testateur.

The *considérants* of the same court, *re Quartin* and of the Paris Court of Appeal, in *Mendes* v. *Brandon*, cited above, are as strong and clear in the same sense.

On the same principle it is held in France that a joint will, although null if made in France, is valid in France if it is made by foreign consorts in their domicile of origin, according to the law of the place, even for immovables (1).

A case of *Whall* v. *Van Often* (2), goes very far in support of the same doctrine. There, a holograph will made in France by a Dutchman was declared valid as to the personal estate left by the testator in France, though by the Holland Code holograph wills are not merely not allowed, but prohibited ; so that the estate in France went to the legatees under the will and the estate in Holland went to the heirs at law, the court unequivocally repudiating, as they did in the Meras case cited before, the preponderance of the foreign law over the municipal law of the country that, in the present case, the doctrine of the Court of Queen's Bench would concede to the New York law over the law of the province of Quebec.

1) Journ. de Dr. Intern. privé, 1882, pages 322, 360.

(2) Dal. 59, 2, 158; S. V. 60, 2, 37.

These examples demonstrate that no rules or principles of private international law, upon which the respondent partly bases his contentions on this point, can have any bearing on this case. There are on the question no rules *ex comitate* between States or *ad reciprocam utilitatem* that can be given effect to in the courts of justice. Each country, as the cases I have quoted demonstrate, follows its own law in each case without reference to the foreign law.

In *Dupuy* v. *Wurtz* (1), for another instance, a citizen of New York made his will in France bequeathing both real and personal property in the form recognized by the State of New York. That will was clearly null *in toto* in France. But the New York Code held it good *in toto* (2).

A New Yorker, who whilst temporarily in Quebec, desires to make a will, has, by the New York law, to make it according to the New York form to devise his real estate in New York, and if he desires to bequeath any estate, real or personal, situate in Quebec, he must, by the Quebec law, make another will according to the Quebec forms. But a will by a Quebecer in the New York forms, whilst temporarily in New York, will, by the Quebec law, pass his real and personal estate in Quebec, and, by the New York law, both his real and personal estate in New York. And in this Dominion itself the same divergence exists in the laws between the different provinces, at least between the province of Quebec and the English law provinces. A will made in Quebec, for instance, under the French law form does not affect real estate in Ontario, but a will made in Ontario under the Ontario form affects real estate in Quebec. This shows that international law has nothing to do with the question.

(1) 53 N.Y. 556.

(2) See 7 Laurent, Dr. Intern. 21-2, on that case.

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In Louisiana, in 1848, in *Re M'Candless* (1) it was held that under the civil law in force in that State the form of the will is to be decided according to the law of the place where made, whether it relates to movables or immovables situated in another country, whatever principles to the contrary may prevail in countries governed by the English common law, and consequently, a will of movables and immovables situated in the state, made in another country by a citizen of the state, temporarily there according to the forms of that other country, was declared valid. This Louisiana decision, rendered under the same system of law that rules the province of Quebec, is a striking instance of the difference between the English and the French law on the subject, a difference which we must constantly bear in mind in determining this case.

Under the English law the rights that attach to the person and are carried with him everywhere, under the rule *mobilia personam sequuntur*, include, as to personalty, the right to make a will in the form of the testator's *lex domicilii*. Under the French law that rule does not extend to forms of wills; this right of a testator is not included in the rights that attach to the person, and the laws as to forms of deeds or wills are *statuts réels*, not *statuts personnels*.

Another great difference between the two is that under the French system the rules for the forms of wills are the same for movables as for immovables. Laurent (2); Pothier (3); 1er Boileux, page 22; Quartin's case, cited above, and Annotator's remarks; whilst under the English system the *lex rei sitae* strictly prevails as to realty. It does not necessarily follow, however, (under both systems pro-

(1) 3 La. An. 579.
(2) Dr. Intern. vol. 7, no. 10 *et seq.*
(3) Introd. aux Cout. ch. 1er, part 1ere.

bably) that a will to be valid in form must conform to that law which would have regulated the succession to the testator's property if he had died intestate, as said per Sir John Nicholl in England, in *Curling* v. *Thornton* (1), and as results from the judgment of the Cour de Cassation in France in *re Quartin* above cited on the first ground of the *pourvoi*.

In *Bremer* v. *Freeman* (2), the Privy Council held that by the French law an Englishman domiciled in France, though not naturalized, cannot validly by a will made in France in the English form bequeath movable property in England. The French courts would unquestionably have also held the will in question in that case void, as, under any circumstances, by the French law, is a will in the English form made in France, even by an Englishman domiciled in England, valid either as to movables or as to immovables, whilst by the English law, such a will made in France by an Englishman domiciled in England is valid, and, in fact, as to real estate in England, the only one that an English court would recognize. The French law had in that case been misconstrued in the Prerogative Court (3).

The respondent's argument by which he relies on the private international law in force in New York to uphold Ross's will is based on the same fallacy as his argument by which he tries to uphold it on the New York Code of Procedure (4). It is a *petitio principii*. It assumes that the will is good by the Quebec law. It is merely an argument that could be invoked if Ross's will had been made in Quebec. Then it would unquestionably be good in Quebec both as to movables and immovables, and good by the New York law to

(1) 2 Addams 19.
(2) 10 Moo. P.C. 306.
(3) 1 Deane, 192.
(4) Westlake Private International Law, pars. 83, 84.

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transmit personal property in New York. It is a settled principle of private international law that the formalities required for a deed or an instrument of any kind, are those required by the law of the place where the deed or instrument is made. *Locus regit actum*; Journ. de dr. intern. privé, 1883, p. 85. The respondent's argument begs the whole question and assumes that this holograph will made in New York is just as valid by the Quebec law as if it had been made in Quebec. In other words, it assumes that art. 999 of the Code Napoleon is not new law, and that the rule *locus regit actum* is not law in Quebec, both of which propositions are untenable.

I would come to the conclusion that Ross's will is void, but in any case I do not see how it can affect immovables in Quebec. It is only as to movables that the New York statute, in express terms, legalizes a devise by a foreigner made according to his *lex domicilii*, and Ross's will, it is conceded, would not affect immovables situated in New York, if he had left any. If he had devised his immovables only clearly his will would not be admitted to probate in New York. On what principle it can be made to extend to immovables in Quebec I cannot see. The intentions of the testator are to be given effect to, it is said. Certainly, but that is so only of the intentions that he has expressed in a valid will, and so far only as such will is valid. If intention alone was to be given effect to there would be no need for any form. If a will is valid as to movables the testator's movables will pass under it, but if invalid as to immovables these immovables are left intestate.

Such was the result of the two cases before the Privy Council of *Meiklejohn* v. *The Attorney General* (1), and *Migneault* v. *Malo* (2), in both of which, though the tes-

(1) 2 Knapp 328. (2) L.R. 4 P.C. 123.

tators had clearly disposed of both their movables and immovables, yet the wills were held valid as to movables only. To use the words of Lushington J. in *Croker* v. *The Marquis of Hertford* (1):

> We sit here not to try what the testator may have intended, but to ascertain on legal principles what testamentary instrument he has made.

And in France it is said on the same principle:

> La solennité des testaments qui est de droit public est de beaucoup plus grande et plus puissante considération que l'entretènement de la dernière volonté d'un particulier. Brodeau sur Louët, vol. 2, p. 754.

In this very case it is evident that Ross's intention was to bequeath all his immovable property wherever situated. Yet it is conceded that his will does not cover the immovables he left in Ontario.

The only point that now remains for my consideration in this case is the view taken by the Superior Court that this will is valid as made in the English form as it was introduced in the province in 1774. Now, under the Statute of Frauds, the English law in force in Quebec in 1865 when this will was made, nothing but personal estate could be devised by a holograph will. And here again the judgment should in any case be reformed so as to maintain this will only as to the personal estate of the testator. But I go further, and I think, with what may be assumed to have been the unanimous opinion of the Court of Queen's Bench, that this will, as an English will, is null *in toto*. By the English law, different in this again from the French law (2), the will speaks at the death of the testator and it is the law at the time of Ross's death that governs the execution of his will. Now, by that law, art. 851 of the Code, in force when Ross died, wills derived from the English form both as to mov-

(1) 4 Moo. P.C. 339.

(2) Dev. table gén. *v.* Testament, no. 37; Sirey 1er vol. Codes Annotés sous art. 2, No. 163; *Migneault* v. *Malo*, L.R. 4 P.C. 123.

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ables and immovables must, as now in England, be executed before witnesses. Art. 2613 C.C. invoked by the respondent against this has no application. That it is the law at the time of the death that governs the wills derived from the English law and its execution is no new rule in the Code. And that article relates only to new rules or changes made in the law by the Code so as not to affect past transactions or acquired rights. And when article 581 decrees that thereafter all such wills must be executed before witnesses, that applies to the wills of all those who died after the coming into force of the Code.

I would allow Annie Ross's appeal and maintain her action. Consequently, and also for the reasons given by my brother Fournier, I would dismiss all the interventions with costs on all the issues, and allow Frank Ross's appeal with costs on the appeal between him and those intervening parties. I remark that in the formal judgment of the Court of Queen's Bench there is no reference to these interventions or any of them. However, this has no consequence.

As to Frank Ross's appeal or cross-appeal as between him and the plaintiff, there should be a reformation at least of that part of the judgment by which he is condemned to deliver up the real estate left by the testator outside of the province of Quebec, and to render an account of his administration thereof. It is established that he never had possession of that real estate. The admission in the record relates only to the estate devised by the will, and the realty outside of the province, it is conceded, did not pass by the will. How can he deliver up what he never had, or render an account of an administration which he never had?

SEDGEWICK J.—I concur with the learned Chief Justice in this case except as to that part of the judg-

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ment relating to Morrin College, whose intervention in my opinion should be maintained as that of a charity within the terms of the will, and except as to costs in the lower courts. I think that the order of the Superior Court and the order of the Court of Queen's Bench as to costs should stand except as to the interventions dismissed.

KING J.—I concur in the judgment of the Chief Justice except as to costs in the lower courts. The orders in the Court of Queen's Bench and the Superior Court should stand except as to the interventions which have been dismissed.

Appeal and cross-appeal dismissed with costs.

Solicitors for appellant Frank Ross: *Caron, Pentland & Stuart.*

Solicitor for appellants Annie Ross, *et al*: *Eugene Lafleur.*

Solicitors for respondents, Morrin College, Finlay Asylum and W. R. Ross: *W. & A. H. Cook.*

Solicitor for respondent, Mary Frame: *G. Irvine.*