1910

*May 19.

*June 15.

CHARLES H. MUSGRAVE (DEFENDANT) ..... } APPELLANT;

AND

DAVID ROBINSON ANGLE (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Evidence—Will—Evidence Act—R.S.N.S. (1900) *c.* 163, *ss.* 22 *and* 27 *—Secondary evidence—Ejectment—Mesne profits.*

Section 27 of the "Evidence Act" of Nova Scotia (R.S.N.S. (1900) ch. 163) provides that "a copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved."

And by the first two sub-sections of section 22 it is provided that: —

"The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy."

"(2) This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills."

Held, that a copy of a will executed before two notaries in the Province of Quebec under the provisions of article 834 C.C. certified by one of said notaries to be a true copy of the original in his possession, is admissible in evidence on the trial of an action of ejectment in Nova Scotia, as provided in section 27.

PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

1910

MUSGRAVE v. ANGLE.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The plaintiff brought action to recover possession of a lot of land in Sydney, C.B., which he claimed as devisee under the will of one George I. Bradley, of Montreal, Que. The defendant set up a title by possession, and also claimed a large sum in payment for improvements and disbursements.

The plaintiff proved the title of George I. Bradley and tendered in evidence a copy of his will certified by a notary of Montreal. The will purported to be in authentic form and executed before two notaries as required by article 843 of the Quebec Civil Code. The trial judge admitted the copy as proof of the will, and gave judgment for the plaintiff for possession of the lot and mesne profits for nine years, also allowing defendant his claim for improvements. This judgment was affirmed by the full court in Nova Scotia which held, however, that plaintiff could only recover mesne profits for the period in which the title was in him and the defendant's claim should be limited to the same space of time. This would give plaintiff more than was allowed at the trial, but as there was no cross-appeal the latter amount stood.

The defendant appealed to the Supreme Court of Canada, claiming that the copy of the will was improperly admitted in evidence, and that his claim should be allowed as settled at the trial.

O'Connor K.C. and *A. D. Gunn* for the appellant.
Finlay McDonald for the respondent.

GIROUARD J.—I concur in the judgment of Mr. Justice Idington.

1910

MUSGRAVE v. ANGLE.

Davies J.

DAVIES J.—The will, the admissibility of which in evidence was in question in this case, was executed in the Province of Quebec before two notaries public in manner and according to the requirements of article 843 of the Civil Code of that province.

It was known to the law of Quebec as an "authentic will" and remained of record with one of the witnessing notaries as an original document as required by article 844.

No probate was contemplated or could be made of such a will when filed or remaining with the notary.

There are two other classes of wills which may be made pursuant to the Code, namely, holograph wills and "those made in the form derived from the laws of England," article 842.

These two latter classes of wills must be probated as provided by article 857 and special provision seems to be made for the probating of wills found amongst testator's effects after his death. Section 1367 of the Code of Civil Procedure.

The 27th section of the "Evidence Act" of Nova Scotia provides as follows:

> A copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved.

A copy of the will in question in this case duly certified by the notary with whom it was recorded to be a true copy of the original in his possession as such notary, was offered in evidence at the trial of this cause. It came within the very words of the statute, being a notarial act or instrument in writing made in

the Province of Quebec before a notary public and filed and enrolled by him.

It appeared on its face to have been executed in compliance with the formalities required by the laws of Nova Scotia respecting wills, otherwise it would not have any effect upon the disposition of lands in that province purported to have been made by it.

The section of the "Evidence Act" above quoted, enacts that such certified copy

> shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved.

No language could, in my opinion, be plainer alike as to right to put the certified copy in evidence and as to its effect when so received.

It is to "have the same force and effect as the original would have if produced and proved."

The certified copy of the will was admitted in evidence and the judgment of the Supreme Court now in appeal held that it was rightly so received and that it had the full effect prescribed by the section above quoted.

The argument of Chief Justice Townshend, who dissented from the judgment, was based upon the grounds that the section relied on made no specific mention of "wills" and that these instruments are fully dealt with by section 22, sub-sections 1 and 2.

The section reads:

> The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity

1910

MUSGRAVE v. ANGLE.

Davies J.

of the alleged original will, and its unaltered condition and the correctness of the prepared copy.

Sub-section (2) This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills.

This sub-section 2 only refers to wills proved elsewhere than in Nova Scotia, which have been probated in courts having jurisdiction over the proof of wills, etc., and therefore would cover the two classes of wills executed in Quebec, namely, holograph wills and "wills made in form derived from the law of England."

It does not, however, cover "wills in notarial or authentic form" filed or remaining with the notary before whom it was received such as the one in question, the probating of which is not contemplated by the Code.

These latter are, in my opinion, clearly covered by section 27 of the "Evidence Act" as "notarial acts or instruments filed, enrolled or enregistered" by a notary.

The Chief Justice seemed to be of the opinion that if this certified copy of the will was admitted "transfer of land could be made without any record in the province and without any of the proofs required by our (N.S.) statute for authenticating the due execution of wills."

But that is not so. "Authentic wills must be made as originals remaining with the notary," article 844. They must conform to all the special prescribed requirements of that and the following articles, and so far as they make any disposition of land in Nova Scotia they must conform to the proofs of the statutory law in that province relating to the due execution of wills.

1910

MUSGRAVE v. ANGLE.

Davies J.

The intention of the legislature seems to be plain that so far as wills executed in Quebec in "notarial or authentic form" are concerned, and which cannot be probated there, they fall within section 22, which latter section clearly does not cover such authentic wills as the one here in question.

I agree with the disposition of "mesne profits" made by the court below and would dismiss the appeal with costs.

IDINGTON J.—Two questions are raised by this appeal.

The appellant claims he is not liable as he has been found for mesne profits and is entitled to full value for improvements he had made on land in question before action brought.

I think the learned trial judge's findings of fact upheld by court below cannot be disturbed.

On such findings I do not see any legal error.

The other point is that the proof accepted, of the will made in Quebec and under and by virtue of which the plaintiff claimed, was inadmissible, and even if admissible insufficiently proven.

The will was certified by one of the Quebec notaries by whom it was drawn up and before whom it was executed and in whose hands it had been as usual in that province left after execution.

The will never was admitted to probate.

It is urged that unless and until so admitted this action cannot succeed.

In the "Evidence Act" of Nova Scotia there are two enabling sections to overcome the difficulty of adducing proof by secondary evidence relative to documents which it is physically impossible or highly in-

1910

MUSGRAVE v. ANGLE.

Idington J.

convenient to produce at trial or even within the jurisdiction of the court.

The first, being section 22 of said Act relative to wills, is as follows:

> The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy.
>
> Sub-section (2). This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills.

The first sub-section just quoted never could have been of use for such purpose as here in question.

The second sub-section makes it applicable to wills though it seems to contemplate probates only. But pass that it makes it applicable only where "the original wills have been deposited and the probate and copies granted in courts having jurisdiction," etc.

When this was first enacted there was an impossibility in some cases not unlikely of occurrence to get probate in Quebec at all. 2 Edw. VII. ch. 37 (Quebec), helped to overcome this.

I will not say it would now be impossible to get probate of any will in Quebec. But of what good ?

A probate is but *primâ facie* evidence of the authenticity of a will.

It is liable after probate to be attacked and set aside.

In Quebec the practice of observing the form of having documents executed before a notary or notaries

and the system of law recognizing such officials and constituting the documents so executed authentic is the legal equivalent of the probate. Hence wills made in authentic form are not as Chief Justice Townshend fears if recognized likely to become a source of fraud or danger any more than probates in another country.

The authentication by a public official in the one case accompanies the act done and precedes and in the other succeeds the death of the testator.

It is, I take it, recognizing such a condition of things that the Legislature of Nova Scotia enacted as follows by section 27 of said Act:

> A copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved.

It was, I rather think, from a comparison of article 1215 of the Civil Code of Quebec taken therefrom and adapted to what was needed in Nova Scotia relative to transactions in Quebec.

There is nothing inconsistent between these two sections, Nos. 22 and 27.

Indeed, I venture to submit there is nothing difficult or dangerous in permitting operation being given to both and more that there are possible cases even where English law prevails in which probate of a will dealing only with land and not naming an executor may be impossible and a third section covering this ground would be advisable legislation for Nova Scotia.

As to Quebec, where the will is not authentic probate undoubtedly can be got and this section 27 is only as to notarial acts or instruments in writing and leaves

1910

MUSGRAVE v. ANGLE.

Idington J.

others, for which the safeguards of notaries does not vouch, untouched and to fall under the 22nd section.

There is this to be observed as possibly wanting in this case at the trial. Some proof of the Quebec law as to notaries and their practice of retaining wills so as to render it physically impossible to produce them, perhaps had better have been given to enable the secondary evidence to be admitted.

The nature of the objections as appearing on this record leaves it doubtful if the point was taken.

Fortunately, assuming it was inasmuch as we can here (see case of *Logan* v. *Lee*(1)) take judicial notice of the law that such was the case the objection falls.

I think the section 27 applies herein and is quite sufficient to cover the other objections taken.

I agree in the reasoning of Mr. Justice Russell, which covers points I have not touched upon.

Appeal should be dismissed with costs.

DUFF J. concurred with Idington J.

ANGLIN J.—I am of opinion that, under section 22 of R.S.N.S. ch. 163, it was proper to receive the notarial copy of the will of Geo. J. Bradley in evidence and to act upon it without further proof of its authenticity, validity or due execution in conformity with the requirements of the law of Nova Scotia as to wills disposing of real property. I agree with Mr. Justice Russell that

> If this section had been intended merely to say that the original document should be received in evidence *valeat quantum* it might well have closed with the phrase directing that it should be received in evidence in place of the original. In that case the question might still be left open whether, although admissible in evidence and effectual for some purpose, it could be effectual to operate on the

(1) 39 Can. S.C.R. 311.

1910

MUSGRAVE v. ANGLE.

Anglin J.

title to land in this province. * * * It (the notarial copy) is to have the same force and effect as the original would have if produced and proved. Proved how? Proved to have been executed in the manner in which it purports to have been executed. The language might have been more explicit, but I think it means nothing if it does not mean this.

I further think that the language of the statute means that the notarial copy is to be deemed not merely evidence of an original document, in the terms of the copy, having been duly executed as the copy purports to shew, but also *primâ facie* proof of an original instrument otherwise valid.

I am also of opinion that the provisions of section 27 do not apply to a Quebec notarial will, which this was. Probate of such a will is not required in Quebec. If section 27 were applicable, it does not at all follow that its presence in the statute would render section 22 inapplicable. *Prescott Election Case* (1).

Upon a perusal of the judgment of the learned trial judge and of the evidence before him I am further of opinion that the plaintiff has received full compensation in respect of his expenditure for improvements.

I would therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. D. Gunn.*

Solicitor for the respondent: *David A. Hearn.*

(1) Hodgins' El. Cas. 1.