

DAME MARIE-JEANNE MATHIEU } APPELLANT;
 (Defendant)

1956
 *Mar. 12
 *Apr. 24

AND

AMEDEE SAINT-MICHEL (*Plaintiff*) ..RESPONDENT;

AND

TELESPHORE BRASSARDMIS EN CAUSE.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,
 PROVINCE OF QUEBEC

*Wills—Donation—Validity—Mental incapacity—Raising of prima facie
 presumption of—Burden of proof required by Art. 986 C.C.*

This was an action to annul a deed of donation inter vivos and a will taken by the respondent on the ground that the deceased had been of unsound mind when she executed them. The trial judge dismissed the action and this judgment was reversed by a majority in the Court of Appeal.

*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

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Held: The appeal should be dismissed.

The medical evidence to the effect that the deceased was in a state of extreme mental senility was sufficient to raise a prima facie presumption of mental incapacity and to cast upon those supporting the donation and the will the burden of displacing it by convincing proof that the deceased at the time was able to give the valid consent required by Art. 986 C.C. The presumption has not been displaced by the appellant.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing, Rinfret J.A. dissenting, the judgment at trial.

L. Dussault, Q.C. and *G. Filion* for the appellant.

E. Leithman for the respondent.

The judgment of Taschereau, Rand and Locke JJ. was delivered by:—

RAND J.:—In this appeal the validity of a donation *inter vivos* and of a will is challenged on the ground of mental incompetency. The donatrice and testatrix, born in 1888, then living in Farnham, Quebec, had in 1907 obtained a judicial separation from her husband and from then until 1928 had supported herself and only child by her earnings. In that year she inherited premises in Montreal which contained ten apartments, and there with her son made her home until his death in 1939. Shortly thereafter she asked her brother, the respondent, in Farnham, to move to Montreal for companionship and to assist her in managing her property, which he was unable to do until 1943. In the meantime, in 1940, she had made a will in which he was made universal legatee of which he learned soon after settling in Montreal in one of the apartments.

His sister was then suffering from arteriosclerosis, rheumatism, high blood pressure and nephritis which in 1945 was in an advanced and progressive stage. From 1943 until October, 1947 the brother and his wife gave her their friendly services in general oversight of the property and in attentions to her personal needs and conditions.

These good relations continued until September, 1947, when near the end of that month a "chicane" took place between the sisters-in-law which ended in each declaring that she would not again enter the door of the other. But

this threat did not affect the daily attendance by the respondent and his wife on the deceased which continued as before at least until the events took place which give rise to this litigation; nor, as will appear, did it prevent the sister from visiting in the apartment of the brother thereafter.

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On October 25 the deceased, with notary Gaudet, the appellant Bousquet, age 35, and his wife, attended the office of notary Poirier in Montreal where, in the presence of all five, instructions for a deed of donation of the property were given. That Bousquet was the spokesman appears from the cross-examination of the notary:

Les instructions m'ont été données quand madame Bail, monsieur et madame Bousquet, monsieur Gaudet étaient à mon bureau. Cela a été discuté tout ensemble.

Qui a donné les instructions? . . .

On m'a donné le principe général.

Qui?

Monsieur Bousquet, cela a été incorporé.

C'est monsieur Bousquet le dernier qui vous a donné le plan de votre document, les conditions que vous avez incorporées dans l'acte?

Oui, avec toute l'approbation de madame Bail, elle a dit la même chose elle-même.

The "general scheme" was a simple gift reserving the usufruct for life with obligations on Bousquet which can be summarized by saying that he would see to the maintenance of the property for which he would furnish the labour, and to the personal requirements of the donor, for all of which, except the labour, she would bear the cost. There was a résolutoire condition in case the donee predeceased her. At her request he was to take up living in her apartment without rent but otherwise occupying a lodging would be at the usual rent. According to Mme. Bousquet it was arranged that her family would move to one of the apartments in 1949, two years later, "pour rester à côté d'elle". The notary appreciated nothing of the serious physical condition of the deceased; he says he saw no change from her appearance seven years before which would seem to rule out any reliance on his powers of observation; and her "approval", however indicated, could not have been more than mere assent to questions put that called for "yes" or "no"; there is no suggestion that she played any greater part in the discussion. The document was drawn up and executed at her home on October 30.

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On the 30th of December, Bousquet and his wife, along with the deceased, again attended at the office of Poirier where the latter is said to have instructed him to draw a new will giving all of her property to Bousquet, which was executed in the presence of another notary. What property, if any, she possessed in addition to the apartment house, does not appear. According to the witnessing notary, while he was present she said nothing. Poirier produced in court a memorandum made by himself and annexed to the will of 1940 to the effect that on September 30 the deceased had revoked the will of 1940, and the later one includes an express revocation of all previous testamentary instruments.

About April 20, 1948 while spending the afternoon at the Bousquet's she suffered a paralytic seizure which culminated in her death on June 16. From the making of the donation until June 2 she lived alone in her apartment as before but on that day she was taken to the Bousquet home where she died.

Medical evidence was given by physicians who had attended her in 1945, 1946 and 1947 and they agree that she was then in the grip of the deterioration mentioned. Dr. Tremblay, aged 56, to whom she was taken by Mme. Saint-Michel, wife of the respondent, found her in 1945 to be a very sick person, suffering from a chronic and progressive disorder which had produced a "ramollissement cérébral", a "grand déséquilibre, une grande déficience" of mind,

Bien, elle souffrait (in 1945), c'était une grande malade, elle avait peine à se conduire, c'est-à-dire elle ne pouvait pas venir au bureau seule, elle était toujours accompagnée.

* * *

Même au point de vue mental, je crois qu'elle était encore dans un degré plus avancé, une diminution des facultés, une grande diminution.

* * *

C'était la mémoire qui faisait défaut et toutes ses idées c'était plutôt lent, . . .

* * *

Dans ses idées il n'y avait pas de collaboration et en la questionnant, les réponses qu'elle nous donnait, c'était plutôt vague.

Par les réponses qu'elle vous donnait, pouvez-vous dire si elle comprenait les questions que vous lui posiez?

Oui, elle comprenait, mais il y avait une diminution, je pourrais dire une diminution de 50% peut-être avec une personne normale.

He saw her again around Christmas, 1947:

Je l'ai vue une fois, j'ai été voir son frère et elle était là, un soir. M. Saint-Michel faisait une crise d'asthme et elle était dans la cuisine à causer, et elle n'a pas semblé me reconnaître. Je l'ai trouvée dans un état très pitoyable.

* * *

Oui, bien pitoyable. Je lui ai demandé comment elle allait et je pense qu'elle ne m'a pas répondu et je pense qu'elle n'a pas semblé me reconnaître du tout.

* * *

Elle ne disait pas grand'chose. C'était moi qui étais obligé de la questionner pour savoir de quoi elle se plaignait, de quoi elle souffrait. Elle était pas mal perdue.

* * *

Je suis certain qu'elle ne faisait pas ce que je lui disais parce qu'elle avait l'air d'oublier bien vite ce qu'on pouvait lui dire. Elle se rappelait pratiquement de pas grand'chose.

In 1946 Dr. Forbes, age 69, called by Mrs. Saint-Michel, attended her on three occasions at intervals of from seven to ten days. He found her suffering as already described, and asked whether in his opinion that condition had existed for some time said,

I think so because her behaviour plainly indicated an intellectual deficiency which I attributed to a chronic trouble . . . softening of the brain.

To this he adds,

Was there any doubt in your mind, when you saw her the first time, that she was suffering from what you call "softening of the brain"?

I had no doubt at all. My first impression was: she appeared dull and stupid like—inattentive to the questions I was putting to her.

Could you, from her answers, gather whether she understood the questions you were putting to her?

She appeared indifferent and this struck me especially—I mean in the condition she was and suffering from what she did.

* * *

Well, my foregone conclusion was that I could not expect any cooperation from her.

* * *

She was indifferent and inattentive to the interest I was taking in her case. (Resulting from her mental condition.)

What would you expect in time, in so far as the softening of the brain is concerned?

That progressively she would get worse and that she would end most likely—eventually—by having a stroke.

But she could have better periods if she were taken care of, and followed a diet?

Well, I was not under that impression. It was a foregone conclusion in my mind, that there would never be any improvement. It was impossible due to the damaged condition of the brain at that time, and due to the arteriopathic condition of the brain.

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His prognosis was given remarkable confirmation by the event.

Then Dr. Senecal, 45 years of age, called in to see her in July, 1947 for some skin trouble, who found her mentally feeble, summed up his impression as follows:

Lors de votre examen, naturellement, vous avez posé des questions, vous avez remarqué des faits; dans quelle condition mentale, d'après vous, se trouvait la patiente?

Bien, évidemment, elle m'a fait l'impression d'être affaiblie au point de vue mental, comme elle l'était d'ailleurs au point de vue physique.

Sur quoi vous basez-vous pour dire qu'elle était mentalement affaiblie? C'est une impression, son comportement général.

Le fait qu'on la conduisait par la main et aux questions demandées elle répondait plutôt vaguement. "Depuis combien de temps cela dure?" "Je ne sais pas". "Une semaine?" "Peut-être." Ce ne sont pas des choses concluantes, mais tout de même. . . .

The appellants called Dr. Girard, 79 years of age, who had attended her for the first time on April 20, 1948, when the seizure occurred. The paralysis had affected her tongue and she had difficulty in speaking:

Elle répondait difficilement un petit peu, elle avait une température assez élevée, pression artérielle de 180, les jonctives un petit peu hypertrophiées, les conjunctives un petit peu tuméfiées, la figure un peu rouge. Elle ne disait pas grand chose. J'ai pris son pouls qui était passablement rapide. Je n'ai pas marqué la vitesse, sa pression était de 180 sur 75, la pression artérielle.

* * *

Voyant qu'elle avait de la difficulté à parler, je lui ai posé le moins de questions possibles.

Malgré tout, est-ce qu'elle a répondu à vos questions?

Très bien, autant par des signes que par la voix.

Est-ce qu'elle semblait avoir de la difficulté à comprendre vos questions?

Non, parce qu'elle souriait, elle me répondait; quand elle ne répondait pas de la voix elle répondait par des signes.

On April 30 at her home:

Est-ce qu'elle vous a reconnu comme étant le médecin qui l'avait soignée il y avait dix jours?

Je ne peux pas affirmer, cela a paru comme si elle me reconnaissait parce qu'avant d'engager une certaine conversation, elle m'a répondu très bien, elle était beaucoup améliorée.

Subsequent visits were made:

On May 9:

Qu'est-ce que vous avez constaté, cette fois-là, chez madame Bail?

Il y avait encore un peu de paralysie, cependant il y avait un peu d'amélioration. La paralysie existait surtout dans sa langue.

* * *

Est-ce qu'elle vous a répondu facilement ou difficilement?

Assez difficilement.

May 20 and June 2:

... on voyait que la paralysie se faisait progressivement, mais bien lentement; sa circulation était méchante; l'expression était diminuée, sa figure était tombée.

* * *

Qu'est-ce que vous avez constaté à ce moment-la?

La paralysie était presque complète du côté droit.

Au point de vue intellectuel?

Elle n'avait pas connaissance.

Le deux (2) juin?

Oui, monsieur.

L'avez-vous revue avant son décès?

Oui, le quatre juin, les sept, neuf, onze juin.

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As to blood pressure and senility:

Grosse hypertension?

Oui, monsieur.

Pouvez-vous nous dire si, d'après vous, cette hypertension existait depuis longtemps?

C'est difficile à répondre parce qu'on voit des cas qui vont avoir une pression normale et il va arriver certaines circonstances et que le lendemain ils vont faire une pression très haute.

Quant à madame Bail, vous ne pouvez pas dire si elle avait cette hypertension depuis deux ou trois ans avant?

Je ne crois pas, cela aurait pu exister depuis quelques mois.

Mais pas deux ou trois ans?

Je ne crois pas.

* * *

Comment décrivez-vous la sénilité?

C'est un ramollissement du cerveau.

* * *

N'avez-vous pas ajouté "grosse hypertension cardiaque et rénale"?

Oui, cela c'est bien cela.

In view of the unchallenged facts of her condition from 1945 through to the stroke on April 20, the opinions expressed by Dr. Girard furnish us with no assistance.

In addition to this testimony, that of neighbours and acquaintances of both the deceased and the Bousquet's was presented of small items of behaviour which presented the usual conflict. What seems to be placed beyond doubt was the decay of memory and the childishness of mind into which she had sunk. Quite apart from the testimony of her brother and sister-in-law, it is evident that, emotionally as well as mentally enfeebled, she talked and acted like a child, and presented a mind of the most limited scope of understanding. Mme. Sylvestre who occupied an apartment on the third floor says:

On lui racontait des choses et cinq minutes après elle disait le contraire. Ce n'était pas toujours la même chose qu'elle racontait.

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Elle pleurait beaucoup, dans cet été-là, elle a beaucoup pleuré, surtout les derniers temps, elle pleurait beaucoup, en septembre, (1947) quand je suis revenue.

* * *

Les Saint-Michel s'étaient acheté un propriété et elle avait peur de rester toute seule?

Oui, elle avait peur qu'ils partent sans lui dire.

The witness Dubé:

Normale, comment, physiquement ou mentalement?

Physiquement oui, et mentalement, oui, parce qu'elle disait des choses, vous savez, qui n'étaient pas . . . C'était un discours qui n'était pas tout à fait . . . C'était comme un enfant dirais-je.

She had difficulty in appreciating simple distinctions as, for example, between a 1¢ piece and a 10¢ piece, and common matters told in the plainest language which, after much repetition, she would seem to understand, would be obliterated from memory minutes afterwards. In September and October, 1947 she is said to have proposed to several persons, bare acquaintances, "se donner" along with her property. M. Sylvestre consulted notary Poirier whether he should take over the property and on the advice given him he declined, but he adds significantly:

En premier, je ne la prenais pas au sérieux, ensuite de cela, je m'en suis fait un scrupule.

* * *

Je trouvais que ça n'avait pas de bon sens qu'elle enlève cela à son frère pour me donner cela à moi, qui étais un étranger.

* * *

C'était une femme qui me paraissait malade et elle n'avait pas de discours, une journée elle nous disait noir et cinq minutes après elle disait blanc. On ne pouvait pas parler avec elle.

* * *

Elle agissait comme une personne qui ne se rend pas absolument compte de ce qu'elle faisait.

* * *

C'est-à-dire elle ne donnait pas de reçu, elle présentait le carnet de reçus et ils étaient tous préparés, et elle nous disait de choisir le reçu à notre nom.

* * *

Est-ce qu'elle pouvait se rendre compte que le montant d'argent qui lui était dû lui était payé exactement?

Non, parce qu'elle me demandait: "Est-ce que j'ai le montant, est-ce que j'ai du change à vous remettre?"

Later on Mme. Sylvestre spoke to Bousquet:

J'ai dit à M. Bousquet: "Vous prenez une grosse chance, parce que . . .". Il a dit: "Cela ne fait rien, je prends la chance".

Il prenait la chance de quoi, madame?

C'est tout ce qu'il m'a répondu.

Mme. Lachance:

Elle agissait comme une personne qui retourne en enfance, d'après moi.

* * *

Est-ce que madame Bail vous a parlé au sujet de sa propriété?

Bien, elle avait déjà voulu se donner à nous autres.

Quand cela, madame?

Ca fait à peu près trois ou quatre ans, c'est les premiers à qui elle en a parlé.

Trois ou quatre ans avant sa mort?

Oui.

* * *

Qu'est-ce que vous voulez dire quand vous dites qu'elle ne répondait pas normalement? Quand vous lui avez parlé? Pouvez-vous donner des exemples?

Elle ne comprenait pas. Cela prenait une heure avant de lui faire comprendre.

* * *

Est-ce que cela vous a pris une heure pour la convaincre que la pièce d'un sou était un sou et non pas un dix sous?

Cela a pris une dizaine de minutes, pas plus.

* * *

C'a pris du temps, il fallait lui expliquer et c'était long quand on lui expliquait quelque chose.

Information reached her brother that she was intending to give her property to the Bousquet's and he seems to have asked for remuneration for what had been done for her by a return of the rent paid and a gratuitous lease for a future period. There is in evidence a document dated October 29, 1947, bearing her signature, almost undecipherable, by which she agreed to reimburse him and to permit him to hold his apartment without charge for two years from that date. Notwithstanding this document, in November, on alleged instruction from her, Bousquet had a saisie-gagerie issued against the goods of the brother, which, when the document was produced to the attorneys, was at once abandoned. Assuming that she had assented to Bousquet's action, the necessary inference is that she had completely forgotten the document, but it furnishes no evidence that she was capable of appreciating what she was doing in signing it: it would evidence rather her yielding to whatever was indicated or pressed upon her by others. It is of some interest also that the proceedings alleged a lease under seal dated October 20, 1947 for a term of two years at the rent of \$19 a month. No such instrument was produced at the trial. The claim was for a rescission of the lease and for the further sum of \$57 covering an additional three months' rent. Admittedly Bousquet was the inter-

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mediary representing the deceased and if there was such an instrument, taken with the other document of October 29, it supplies whatever further evidence of confusion on her part might be asked for.

The medical testimony mentioned and that of the other witnesses was either heard or read by Dr. Fontaine, 58 years of age, a graduate of the University of Paris in medical jurisprudence and psychiatry, the medico-legal expert of the provincial government, and his opinion, was unqualified that the deceased was in a state of extreme mental senility, "l'affaiblissement intellectuel", manifesting a regress into infancy. After reviewing the medical testimony he says:

Dé ce témoignage, il résulte que Madame Bail souffrait de déficience mentale qui se traduisait par de la lenteur dans les idées, par des troubles de mémoire, une diminution de la compréhension, de l'inattention, une attitude hébétée et une indifférence et une insouciance qui se manifestent par un certain état de malpropreté, constaté par le docteur Forbes; et ces troubles, tels que relatés par le médecin, sont confirmés par les témoins de la demande:

"Elle racontait des choses et cinq minutes après nous disait le contraire."

"Elle pleurait sans savoir pourquoi et comprenait toujours à côté," nous dit Madame Sylvestre.

"Il n'y avait pas beaucoup moyen de se faire comprendre de Madame Bail; elle agissait comme une personne qui retourne en enfance"—nous dit Madame Lachance.

"Elle répète toujours la même chose, disait quelque chose et deux minutes après le redisait et ce n'était plus la même chose"—nous dit sa belle-sœur, Madame Saint-Michel.

* * *

Ils s'amuse avec les enfants, se chicanent avec eux, les boudent; c'est ce qu'on appelle le retour à l'enfance.

Speaking of the evidence of Dr. Girard he comments:

Le docteur Girard nous a dit que lorsqu'il vit la patiente Madame Bail pour la première fois, elle était paralysée de la langue et qu'elle avait toutes les difficultés du monde à entendre et à parler. Et il a conclu que Madame Bail était parfaitement lucide parce que—nous dit-il—"Elle m'a souri et semblait me reconnaître."

Et aux questions qu'il lui posait, elle répondait surtout par des gestes plutôt qu'au moyen de la parole.

J'ai trouvé étranges ces conclusions: parce que si Madame Bail ne pouvait pas s'exprimer, si elle ne parlait pas, comment a-t-il pu faire pour se rendre compte qu'elle était saine d'esprit?

C'est par interrogatoire et par les réponses aux questions que l'on pose aux malades qu'on peut se rendre compte surtout de l'état mental du patient.

On these facts the trial judge found against the respondent, but on appeal this was reversed by a court of five members, Rinfret J.A. dissenting.

Among the persons declared by the Civil Code to be incapable of contracting are those who "by reason of weakness of understanding are unable to give a valid consent": Art. 986. The evidence both of fact and of opinion given by Drs. Tremblay, Forbes and Senecal, supported by the opinion of Dr. Fontaine, was sufficient to raise a prima facie presumption of that degree of mental weakness or unsoundness and to cast upon those supporting the instrument of donation the burden of displacing it by convincing proof that the deceased at the time was able to give such a consent: *Russell v. Lefrancois* (1); *Phelan v. Murphy* (2). This would mean that she was of an understanding adequate to the act done, that she was able to grasp its character and effect in the setting of her circumstances, that she appreciated the value of the property, about \$20,000, her own physical condition, her future, that she was disposing of her property to a virtual stranger whom she would not have as a neighbour for at least two years, and that the donation was irrevocable: that she had, in short, the intellectual capacity in some degree to view these matters in their entirety in the perspective of her present and possible future life and her family relationships.

So formulated and in the circumstances of the particular case, the test of competency in making the agreement is substantially the same as that of the will. Testamentary capacity was before this Court in *Leger v. Poirier* (3), in which the leading cases were examined. What they indicated was that it was not sufficient that a testator be able to answer familiar and usual questions, but to use the language of Sir John Nicholl quoted at p. 162,

he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

And as it was put in the majority judgment of this Court, a mind capable of comprehending, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like.

* * *

There must have been a power to hold the essential field of the mind in some degree of appreciation as a whole.

This follows *Banks v. Goodfellow* (4), in which Cockburn C.J., giving an authoritative pronouncement on the general

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(1) (1884) 8 Can. S.C.R. 335 at 372. (3) [1944] S.C.R. 152.
(2) Q.R. (1938) 76 S.C. 464 at 467. (4) (1870) L.R. 5 Q.B. 549.

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subject, reviews the treatment accorded it by the foremost commentators in the Civil Law and that of France, and remarks upon the absence in both of the formulation of any specific juridical test of unsoundness.

Attributing to her a vague seeking for some symbol of protection or security, evidenced by the adventitious, hasty and indifferent commitment of herself and property to an unknown young man, a childishly irrational act since she continued to live alone, as she had from 1939, until struck down, and considering, along with the other evidence before us, the inconsequent attitude towards her brother, although their relations remained much as before, the presumption has not, in my opinion, been displaced; I find myself quite unable to say that she was capable of giving an intelligent consent to the deed or that she possessed a "disposing mind and memory".

In this Court the appeal is against the judgment of the Court of Queen's Bench, and unless we are satisfied that that judgment is wrong, it should not be disturbed. While the question at issue is not free from difficulty, I am far from being satisfied that the court below was wrong, and I would therefore dismiss the appeal with costs.

The judgment of Fauteux and Abbott JJ. was delivered by:—

ABBOTT J.:—I am in substantial agreement with the reasons given by Mr. Justice McDougall in the Court below. In my opinion the medical evidence was sufficient to raise a *prima facie* presumption of mental incapacity. On the principle enunciated in *Russell v. Lefrançois* (1), the burden of establishing capacity to have made the donation and the will was therefore shifted to the propounding party and in my view the appellants failed to discharge that burden. I am unable to say that the Court below was wrong in reaching the conclusion which it did and I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Monette, Filion & Lachapelle.*

Solicitors for the respondent: *Cohen & Leithman.*