CELINA ROBIN *et vir* (DEFENDANTS)...APPELLANTS; 1897

AND *Feb. 27.

JOSEPH OLYMPE JEROME DUGUAY (PLAINTIFF) ..... } RESPONDENT. *May 1.

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

Will—Construction of—Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees.

The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared :—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament."

Held, Gwynne J. dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate, (subject to the usufruct), to their children, which took effect at the death of the testator.

Held also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were

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*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct.

Held further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the decision of the Superior Court which had maintained the plaintiff's action.

The facts and questions at issue sufficiently appear from the head note and judgments reported. It may be added, however, that when the usufruct became extinct one of testator's sisters left nine children, one of whom is the respondent, and the other sister left but one child, the appellant.

Robidoux Q.C. for the appellant. A fiduciary substitution was created by the will in favour of both the sisters' children. (Arts. 925, 928 C. C.) The succession must be divided *per stirpes* and not *per capita*. Even if, instead of a substitution, a usufruct had been created, the result would be the same. *Desève* v. *Desève* (2); *Chester* v. *Galt* (3); *Roy* v. *Gauvin* (4); Thevenot-Dessaule, 63. The charge to deliver the property bequeathed to the children of the two sisters, joint legatees, is expressed plainly in the will, by the term "*conserver*" in the sentence "*et conserver le fonds pour leurs enfants.*"

Three conditions are required for the existence of a substitution: 1o. two donations; 2o. *tractus temporis*; 3o. *ordo successionis*. The two donations exist, first to his sisters, secondly, to their children. The *tractus temporis* is also found, for the will charges his sisters to

(1) Q. R. 5 Q. B. 277.
(2) de Bellefeuille Code Civil, 3 ed. p. 200.
(3) 26 L. C. Jur. 138.
(4) 14 R. L. 270.

deliver over to their children the property bequeathed. The children were not seized at the testator's death. The *ordo successionis* is equally evident; the children received from their mothers and are legatees, in virtue of a second gratification. The testator charges his sisters to deliver over the property to *their* children generally, not merely to children born at the time of his death.

No accretion took place, because none of the legatees died before the testator. There can be no accretion once the succession is opened.

The property bequeathed is to serve as an alimentary allowance. There is no accretion, in cases of legacies made to serve as alimentary allowance. 1 Pothier, p. 455, par. 149, art. 868 C. C.

According to the terms of the will, no reciprocal substitution was intended. Thévenot-d'Essaulle, nos. 408 et 409. The requisites of reciprocal substitution are wanting, and we cannot presume reciprocal substitutions. Thévenot-d'Essaulle (1). *Phillips* v. *Bain* (2). The words "*partage définitif*" imply two partages, *i. e.*, a provisional partage first and then a final one.

The word "*leurs*" in cases of substitutions, applied to the children, substitutes of several legatees, is to be construed as determining amongst the substitutes, a partition *per stirpes* and not *per capita*. See Thévenot-d'Essaulle, nos. 1003 & 1004, and *Dumont* v. *Dumont* (3).

The theory of partition, *per stirpes*, prevails, unless the contrary intention is clear. It must be presumed that the testator wished the order of successions to be followed, as nothing appears to the contrary. In any case, whether the will created a substitution or a usufruct, the appellant as sole representative of her

(1) Mathieu's ed. pars. 415 & 416. (2) M. L. R. 2 S. C. 300.
(3) 7 L. C. Jur. 12.

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deceased mother (one of the testator's sisters), is entitled to the ownership of one-half of all the property bequeathed and enjoyed by her mother during her lifetime. See art. 433 C. C.

A. Geoffrion for the respondent. The will creates merely a usufruct, and not a substitution, and even if it did create a substitution, the partition must, nevertheless, be made *per capita*, not *per stirpes*. In both his will and codicil, the testator used the words "usufruct," "usufructuary" which creates this presumption, and it is supported by the fact that there is no *tractus temporis*.

The gift is not of the usufruct to his sisters, and, after their death, the ownership to their children, but the children take the ownership together, and consequently by equal shares at the same time as their mothers take the usufruct. See art. 868 C. C. Again, the word "*conserver*" is not at all characteristic of a substitution. On the contrary, it is the very word used by the Civil Code (1), in defining usufruct. Moreover, the obligation to keep the property for the children is not imposed upon the usufructuaries but upon the executor. Hence it is not a substitution but a trust imposed upon the latter in favour of the children, who are the owners.

There is reciprocal substitution between the sisters of the testator; (art. 868 C. C.); and the testator has treated his two sisters and their children equally and as one mass (not as two independent roots), making one legacy and not two independent ones. This affords further presumption that the partition should be *per capita*. Moreover, the legacy to the children is made jointly. There is therefore also accretion between them. (Art. 868 C. C.) There could not be accretion between them if the partition was *per stirpes*;

(1) Art. 443.

but only accretion between the members of each *stirpes*.

Finally the testator bequeathes his property to the children as "*incessible*" and "*insaisissable â titre d'aliments.*" He considers that he is giving them the necessaries of life. It must therefore be presumed that as the legacy was not to enrich them but only to give them what they needed, the property is intended to be divided among them equally. *Joseph* v. *Castonguay* (1).

GWYNNE J. (dissenting).—This case turns wholly upon the construction of a clause in the will of one Joseph Rochon whereby he gave and bequeathed to his two sisters Exulpère and Rosalie Rochon, the usufruct of all his property and the ownership thereof to their children. He then appointed Pierre Dupras his executor whom he authorized to realize the whole of his estate, and to invest the clear capital at interest in such a manner as he should think most advantageous and to give the revenue thereof to his said sisters, and to keep the capital for their children. He added that the above legacies were given. The executor named in the will having died the testator appointed another in his place by a codicil wherein he declared and directed that such person

shall be moreover the administrator of my aforesaid property until the death of my two sisters, the usufructuaries named in my said will, and until the final partition of my said property between my heirs in ownership, and he shall have the powers which the said Pierre Dupras had in my said will.

The sole question upon this will is whether the children of the testator's sisters took the ownership of the property devised to them *per stirpes* or *per capita*. If *per stirpes* the appellant is entitled to prevail, if *per capita* the respondent.

(1) 3 L. C. Jur. 141.

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I am of opinion that the appeal should be allowed. The true construction of the will appears to me clearly to be that the executor held the property devised in trust for the testator's two sisters and their children respectively in equal moieties for their respective children as to the ownership in the capital, and for the sisters during their respective lives as to the revenues. Upon the death of one of testator's sisters, in the lifetime of the other, the children of the one so dying became entitled in possession to one moiety of the capital out of which their mother's life income issued—the devise to the testator's sisters and "their children," the former for life as to the income, and the latter as to the capital must be construed "their respective children" upon the authority of *Arrow* v. *Mellish* (1); *Wills* v. *Wills* (2); and *in re Hutchinson's Trusts* (3).

I think there can be no doubt that this is the construction which should be put upon the will, and I am therefore of opinion that the appeal should be allowed with costs and the judgment of the Superior Court restored.

The judgment of the majority of the court was delivered by:

GIROUARD J.—Cette cause soulève une question de substitution. Le 12 octobre 1852, Joseph Rochon fit son testament par lequel il dispose de la masse de sa succession comme suit:—

Je donne et lègue à mes deux sœurs germaines, Exulpère et Rosalie Rochon, l'usufruit de tous mes biens généralement quelconques, et la propriété d'iceux à leurs enfants.

Je nomme Pierre Dupras, mon oncle, mon exécuteur testamentaire, lequel j'autorise à réaliser mes biens, retirer mes crédits, payer mes dettes, vendre mes biens, à termes, le tout comme il le jugera à pro-

(1) 1 DeG. & S., 255. (2) L. R. 20 Eq. 342.
(3) 21 Ch. D. 811.

pos ; enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs usufruitières et conserver les fonds pour leurs enfants. * * * * * *

J'assigne les legs ci-dessus à mes légataires, à titre d'aliments, ainsi les biens légués seront incessibles et insaisissables.

Par un codicile en date du 12 avril 1890, le testateur déclara :—

4° Je nomme pour exécuter mon testament, au lieu et place de Pierre Dupras qui l'était dans mon dit testament et qui est décédé, la personne de Maxime Dupras, mon neveu, cultivateur, de St-Henri de Mascouche. Il sera de plus l'administrateur de mes dits biens, jusqu'au décès de mes deux sœurs usufruitières nommées dans mon dit testament et jusqu'au partage définitif de mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament.

Le testateur et ses deux sœurs, Exulpère et Rosalie étant décédés, il s'agit de savoir si le partage des biens légués doit se faire entre les enfants par souches ou par têtes ; en d'autres termes, si le testament contient une substitution ou tout simplement donation d'usufruit à ses deux sœurs et de la propriété à leurs enfants. La cour Supérieure a décidé qu'il y avait substitution, et que le partage devait se faire par souches et non par têtes. La majorité de la cour d'Appel, composée de Bossé, Blanchet, Hall et Würtele JJ. a décidé le contraire, le juge en chef, Lacoste, dissident. Le jugement de la cour est ainsi motivé :— (1)

Considérant que cette disposition ne comporte pas une substitution, ou deux libéralités successives prenant effet l'une après l'autre, mais constitue seulement un legs d'usufruit par le testateur à ses sœurs et un legs de propriété (sujet à cet usufruit) à leurs enfants, qui tous deux ont pris effet à son décès, et qu'en chargeant son exécuteur testamentaire de conserver le fonds pour les enfants, devoir qui lui était déjà prescrit par la loi, le testateur ne peut pas être présumé avoir imposé la même obligation à ses sœurs exclues de l'administration des dits biens et leur en avoir ainsi remis et donné la propriété a la charge de la rendre elles-mêmes à leurs enfants, à leur décès, et ne

(1) Q. R. 5 Q. B. 291.

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peut être interprété comme étant une modification de la clause précédente de son testament, par laquelle il lègue directement aux enfants la propriété des dits biens, etc.

Ce motif est développé par M. le juge Blanchet dans une opinion claire et concise, à laquelle je n'hésite pas à donner mon adhésion. J'entends, cependant, faire mes réserves au sujet des décisions dans *Morasse* v. *Baby* (1), et *Guyon* v. *Chagnon* (2), qu'il cite. Je suis donc d'avis de confirmer le jugement dont est appel, avec dépens.

Appeal dismissed with costs.

Solicitor for the appellants : *J. E. Robidoux.*

Solicitors for the respondents : *Geoffrion, Dorion & Allan.*

(1) 7 Q. L. R. 162. (2) 32 L. C. Jur. 271