

LA BANQUE JACQUES-CARTIER } APPELLANT;
 (PLAINTIFF)..... }

1900

*May 8.

AND

PHILOMÈNE GRATTON *és qual.* } RESPONDENTS.
et al. (DEFENDANTS)..... }

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

Will—Powers of executors—Promissory note—Advancing legatee's share.

M., who was a merchant, by his will gave special directions for the winding up of his business and the division of his estate among a number of his children as legatees and gave to his executors, among other powers, the power "to make, sign and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of 30 years the whole or any part of their share in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts ;

Held, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action.

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

1900 The action was for \$12,188.40 and interest, and based
 LA BANQUE on two promissory notes given in renewal of those
 JACQUES- mentioned in the evidence. The defendants were
 CARTIER
 v.
 GRATTON. sued as executors under the will of the late Claude
 Melançon, and pleaded that the notes were signed by
 them for the purpose of obtaining a loan from the
 bank by discounting them, to pay the debts of Joseph
 Melançon, who was a legatee under the will, by
 advancing his legacy to him ; that the bank, before
 advancing the money, was informed of the purpose for
 which it was needed ; that it was employed for that
 purpose, to the knowledge and under the control of
 the bank ; that the bank knew the terms of the will
 and the powers which the defendants had under it ;
 and that under the terms of the will the defendants
 had no power to sign notes for that purpose.

The executors named in the will were given direc-
 tions as to the management, liquidation and division
 of the business and estate of the testator who was a
 merchant carrying on business in Montreal at the time
 of his death and, among other powers necessary for
 the purposes of the execution of the will, the executors
 were given special powers by a clause therein, as
 follows :

De plus j'accorde à mes dits exécuteurs testamentaires et adminis-
 trateurs le droit de ne faire entrer dans l'inventaire qui sera fait des
 biens de ma succession que le résultat en bloc qui apparaîtra me
 revenir d'après l'inventaire commercial dans les biens et affaires de ma
 maison de commerce et dans toute maison de commerce ou association
 dans lesquelles je puisse être intéressé sans requérir d'inventaire
 notaire pour constater tels dits biens, droits et actions, plus le droit
 de vendre, céder ou transporter d'après l'usage commercial soit à vente
 privée, en bloc ou autrement comme ils le jugeront à propos et con-
 venable et suivant et d'après les termes et conditions et à tels prix
 qu'il leur plaira tout mon fonds et roulant de commerce, *stock*, de
 collecter mes crédits, les vendre ou céder à tant dans la piastre, de
 compromettre et transiger avec les débiteurs et en cas de société de
 régler, compromettre et transiger avec moi ou mes associés à tant

dans la piastre sur l'actif de ma dite succession et de ne faire entrer, tel que susdit, dans l'inventaire notarié de mes dits biens que le résultat en bloc du produit de mon roulant *stock*, et de tous droits et intérêts que je posséderai dans tout société ou association quelconque sans détail, voulant que l'inventaire commercial remplace à cet effet l'inventaire notarié, et je leur donne aussi le droit de transiger et compromettre avec les débiteurs ou les créanciers sur tous les droits, réclamations, dettes ou obligations généralement quelconques, ainsi que sur tous procès et litiges quelconques, de poursuivre en justice pendant leur saisine à raison de tous droits mobiliers ou immobiliers, de même que j'aurais pu le faire moi-même, de plus le droit d'emprunter et de donner toutes garanties sur mes biens, parts ou actions de banques ou autres compagnies ou institutions monétaires et toute hypothèque sur mes biens immeubles dans le cas où les affaires de ma succession le requerraient *ainsi qu'ils croiront à propos de le faire faire, signer et endosser tous billets, suivant qu'il sera requis pour régler et liquider les affaires de ma dite succession.*

1900
 LA BANQUE
 JACQUES-
 CARTIER
 v.
 GRATTON.

One of the subsequent clauses of the will was as follows :

Je donne de plus à mes dits exécuteurs testamentaires et administrateurs ou leurs remplaçants tous les droits et pouvoirs nécessaires de payer en aucun temps, à aucun de mes dits enfants, soit garçon ou fille, après qu'il aura atteint l'âge de trente ans, toute ou aucune partie de sa part dans mes dits biens, aux fins de l'aider, soit à s'établir ou dans le cas qu'il en aurait besoin, le tout suivant la discrétion, prudence et sagesse de mes dits exécuteurs testamentaires et administrateurs à qui je m'en rapporte pour ce faire, les priant de faire en telles circonstances comme je ferais moi-même auprès de tel ou tel de mes dits enfants si je vivais alors et voyais par moi-même les circonstances dans lesquelles tel ou tel de mes dits enfants se trouvait alors placé.

The trial court, Pelletier J., dismissed the action with costs on the ground that the executors had no power to give notes for the purpose above mentioned and on an appeal to the Court of Queen's Bench this judgment was affirmed, Hall and Ouimet JJ. dissenting.

Brosseau for the appellant.

Aimé Geoffrion for the respondents was not called upon.

The judgment of the court was delivered by :

1900

LA BANQUE

JACQUES

CARTIER

v.

GRATTON.

The Chief
Justice.

THE CHIEF JUSTICE: (Oral.)—The question is whether or not the two clauses of the will relied upon by the appellant can be construed together as giving power to the executors to raise the loan upon promissory notes as they have done for the purpose of advancing the share of one of the beneficiaries under the will. I consider that these two clauses are entirely separate and distinct and have no connection one with the other. The testator was a merchant and the provision in his will is evidently intended to assist the executors by giving them power to make promissory notes and indorsements of notes in connection with the winding up of his business for which purpose these powers were probably necessary and are not unusual, but this intention cannot be assumed to extend so far as to give that power to the executors to be used in the distribution of the estate among the beneficiaries or in order to raise money or loans for the purpose of advancing shares to any one of them. Further, it would be simply a wrong to permit money to be borrowed in such a manner for settlements in advance with a legatee in a manner which would bind the other beneficiaries and make their shares chargeable with the legacy advanced.

I think the reasons for the judgment of the court below are clearly right and I am not at all impressed with the reasons given for the dissent from it.

I should also mention that it is quite clear from the evidence of Mr. DeMartigny that the bank had notice of the nature of the powers of the executors under the terms of the will, for a copy of the will was deposited with the bank for its use and reference.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Brousseau, Lajoie & Lacoste.*

Solicitors for the respondents: *Geoffrion, Geoffrion,
Roy & Cusson.*