Privy Council Appeal No. 66 *of* 1923.

Sir Alexandre Lacoste and others - - - - - *Appellants*

v.

Dame Mary M. Duchesnay - - - - - - *Respondent*

AND

Philippe Duchesnay and others - - - - - *Mis-en-cause*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD SUMNER.
MR. JUSTICE DUFF.

[*Delivered by* MR. JUSTICE DUFF.]

The appellants are the executors of the will of the Honourable Charles Wilson, who died at Montreal on the 21st May, 1877, and the respondent was the plaintiff in the action out of which the appeal arises; an action claiming immediate partition of the estate. The question involved in the appeal concerns the construction and the effect of the will, and stated in general terms, is whether the plaintiff is entitled to immediate partition of the estate among the present members of the class of persons eventually entitled to share in it, of which the plaintiff is admittedly one.

There is no dispute as to the facts. The will, which is in authentic form, is dated the 15th of June, 1875, and there are two codicils dated the 1st and 6th of December, 1876, respectively. By article 2 executors are appointed, and the whole of the testator's estate is vested in them in trust for the purposes of the will. By article 3 the testator's widow receives the income arising from the estate during her life, subject to certain conditions not

here material. By article 4 the testator's niece, Margaret Wilson (Madame Duchesnay), receives, after the death of the testator's widow, an annuity of $6,000; and the article further provides for the devolution of this annuity in these words:—

> "And from and after the death of the said Margaret Wilson if there be no issue of her subsequent marriage, the said annuity of six thousand dollars shall devolve and continue to be paid to her children, issue of her marriage with the said Lieutenant-Colonel Duchesnay in equal shares among them during their natural lives, and in the same manner; and in case of the death of any of such children the share of such deceased child shall devolve to and continue to be paid in the same manner to his or her children, Margaret Wilson's grandchildren by representations of their deceased parent, until the final division of my estate, and in default of such grandchildren, then to such of the children, issue of the first marriage of the said Margaret Wilson, that shall be then living and to their children, to be divided between them, *par souches*. And in the case of the death of all such children and grandchildren, without issue before the final division of my estate, then the present legacy shall devolve and revert for two-thirds to my said niece, Anna Maria Wilson, and for one-third to my late brother, Edward Wilson's children, and shall be considered as forming part of the annuity and legacy hereafter given to them."

By articles 5 and 6, as amended by the first codicil, annuities of $6,000 and $3,000 are given to Anna Maria Wilson, wife of Louis Masson, and to the children of the testator's brother, Edward Wilson respectively; and there are provisions as to devolution similar to that in article 4 and for remainders, in article 5, in favour of the beneficiaries under the legacies to Margaret Wilson and the children of Edward Wilson respectively, and in article 6 in favour of the beneficiaries under the legacies to Margaret Wilson and Anna Maria Wilson respectively.

Article 8 provides for fixed annuities in favour of certain other designated persons. Article 11 is in these words:—

> "After full payment of the above bequeathed annual sums, legacies and annuities and the said legacies *d'une fois payés*, if there remain in the hands of my executors any balance or residue of the revenue of my estate, I will and order that such residue devolve and belong to my said nieces, Margaret Wilson and Anna Maria Wilson and the children of my said brother, Edward Wilson and their children, and grandchildren hereinbefore designated, and be added to and increase their respective annuities in the same manner and in the proportions of their respective legacies respectively."

Article 16 (as amended by the first codicil) is as follows:—

> "I hereby give and devise to the grandchildren of my said niece, Margaret Wilson, issue of her marriage with the late Lieutenant-Colonel Duchesnay, of my said niece, Anna Maria Wilson, and of my said brother, Edward Wilson, designated in Articles four, five and six of this my will, the whole of my estate, real and personal, moveable and immoveable, and all my property whatsoever, to be by them owned and held in full ownership, and to be divided among them as follows: four-tenths to the said grandchildren of my said niece, Margaret Wilson; four-tenths to the said grandchildren of my said niece, Anna Maria Wilson; and two-tenths to the said grandchildren of my said brother Edward Wilson . . .

[Here follow provisions for cross remainders among the three families.]

"But the said grandchildren shall not, however, enter upon their respective shares in said ownership until they attain the age of majority respectively, and until that time they shall enjoy or continue to enjoy the revenue or annuity of their deceased parent.

"The present donation in ownership is subject, however, to all the annuities and legacies in this will given and my said universal legatees in this article designated shall not take their legacies until such time as my executors have provided for or laid by a sufficient sum for the annuities which shall be then still payable; but out of the share of the grandchildren of the said Margaret Wilson, issue of her marriage with the late Lieutenant-Colonel Duchesnay, there shall be paid to the grandchildren of the said Margaret Wilson, issue of her second or any subsequent marriage at their age of majority a sum of twenty thousand dollars to be divided equally among them *par souches*."

Anna Maria Wilson died on the 15th November, 1912, without issue, and the annuity bequeathed to her by article 5 has consequently gone to augment the shares of the families of Margaret Wilson and Edward Wilson. Margaret Wilson died on the 19th July, 1911, and of her children one son and four daughters are still living, all having children, and one son has died leaving children surviving, of whom one is the respondent in this appeal. Edward Wilson was dead at the date of the will, five children having survived him, three sons and two daughters. One of the sons, now dead, left three children, all still living. One son died without issue. The third son and both daughters are still alive and have no issue.

The action was commenced on the 12th May, 1921, by the respondent, Mary Margaret Duchesnay, demanding partition of the estate and payment of her share of it. The learned Judge of the Superior Court granted the relief claimed, the principal *considérant* of the formal judgment being as follows:—

"Considérant que les mis-en-cause n'ont pas prouvé que le testateur eut ordonné (C.C. 689) que le partage définitif de sa succession n'eut lieu qu'aprés la mort du dernier de ses petits neveux; qu'une intention du testateur à cet effet ne serait pas suffisante, mais qu'il faudrait un commandement positif; que même cette intention n'apparait pas assez clairement pour être invoquée à l'encontre d'un texte d'ordre public."

In the Court of King's Bench the judgment of the Superior Court was confirmed and the appeal of the present appellants dismissed, Tellier and Howard JJ. dissenting. Guerin J. rejected the contention of the appellants that they must remain in possession of the estate until the final partition on the ground that such possession might in this view last for a farther 50 years, a result which the testator could hardly have contemplated; he thought the possibility of the death of all the descendants in one branch or of further births need not be seriously discussed as restitution could always be claimed from those who had received too much; and that the principle *voluntas habet interpretationem latam et benignam* should be applied, and, as a partial

partition is not prohibited by the will or by law, it should be ordered. Flynn J. thought that the combined effect of Article 689 of the Civil Code and the terms of the will, and in particular of article 16, was to give the descendants who were the *légataires universels* the right to demand partition when they respectively came of age; that the existence of a usufruct in favour of the beneficiaries of the annuities was not in law an objection to a judgment for final partition; that the only partition contemplated by the testator was a final partition and the only condition imposed is the continued payment of the annuities; that the objection of the appellants founded upon the possibility of future grandchildren is not one with which the Court should concern itself in the absence of any evidence on the subject at the trial; and that the judgment appealed from should be upheld as a judgment for final partition. Bernier J. considered that the only conditions of the right to final partition are, (*a*) that the descendant claiming partition shall be of age; and (*b*) that his or her parent shall be dead. Tellier J., with whom Howard J. concurred, came to the conclusion that this action was not maintainable. His view was that after the death of the widow the children and grandchildren of Margaret and Edward Wilson were by article 11 made residuary legatees of any surplus income derived from the estate after the payment of the fixed annuities, and that as this surplus is only calculated annually after the payment of these annuities, and is to be added to the fixed annuities given to the residuary legatees, the surplus is intended to be distributable during the whole of the period in which any part of these fixed annuities remains payable; as these annuities are expressly made payable for the term of the natural lives of the children of Margaret and Edward Wilson, the surplus is clearly distributable during the same period; that the present partition of the estate, even though a sufficient sum were set aside to pay the outstanding fixed annuities, would inevitably deprive some of the residuary legatees of their interest in this surplus; that it was for this reason that the testator by article 17 gave to his executors the power to administer the whole of his estate until the final execution of the will, and the executors are bound so to do and to distribute the surplus in accordance with the directions of the will until the death of all the children of Margaret Wilson and Edward Wilson; that Article 689 (C.C.) does not apply, since until the death of the last of such children the legacy of which the respondent demands her share is not free; that a provisional partition would deprive the appellants of possession and thereby make it impossible for them to perform their trust; that the provision of article 16 that:—

> "the said grandchildren shall not, however, enter upon their respective shares in said ownership until they attain the age of majority respectively and until that time they shall enjoy or continue to enjoy the revenue or annuity of their deceased parent,"

does not give the grandchildren a right to claim partition at their majority, but merely provides that if any grandchildren are still

minors at the time of the final partition the executors shall retain their share in their hands until their majority; that the reference to "their deceased parent" in the passage last quoted indicates that in the contemplation of the testator all the parents will be dead before the final partition takes place; that the words "annuities which shall be then still payable" in the last paragraph of article 16 are referable to the annuities provided for in article 8: and that the testator expressly enjoins that article 16 is not to overrule the rest of the will.

At their Lordships' Board, counsel for the respondent argued that the testator had by article 16 explicitly declared that the "grandchildren" designated by that article should at "their age of majority" enter upon the ownership of their respective shares in the estate; and that as regards "grandchildren" who might thereafter be born, the "grandchildren" who had received their shares would be institutes in favour of these, who themselves would be substitutes. There is, it is said, a tacit substitution in favour of "grandchildren" to be born. It follows, it is contended, that any grandchild on attaining his or her majority is entitled to demand a definitive partition. As regards annuities, the existence of the usufructuary right of the annuitants, it is contended on the authority of Pothier (vol. 7, p. 563, ed. 1827, Dupin) is no impediment to a definitive partition, and, moreover, article 16, it is said, makes provision in respect of the annuities payable under articles 4, 5 and 6 in directing the executors to set aside a sufficient sum to secure the payment of them. This direction it was contended has no application to the residuary income distributed by article 11, the right to which it is said comes to an end on the partition of the estate; but applies to all other annuities granted by the testator.

The effect of articles 4, 5, 6, 8, 9 and 11, which have already been sufficiently quoted or paraphrased is, their Lordships consider, that the whole of the net income derived from the estate is distributed among the beneficiaries named or otherwise designated by those articles. After the death of the testator's widow, the legacies *d'une fois payer* having been paid, the sums receivable by the beneficiaries entitled to share in the annuities payable under articles 4, 5 and 6 become, by force of article 11, proportionately enhanced as a result of the distribution of the residuary income among these beneficiaries.

As the life annuities provided for by article 8 come to an end, and as the income of the estate increases, the amount of the surplus income distributable under article 11 is, of course, correspondingly augmented; and their Lordships think it sufficiently clear that the will contemplates the distribution of the whole of this augmented surplus in enhancement of the sums payable to the beneficiaries entitled to share in the annuities given by articles 4, 5 and 6. The language of article 11 by which the residue "shall devolve and belong to my nieces Margaret Wilson, Anna Maria Wilson, and the children of my said brother

Edward Wilson, and the children and grandchildren hereinbefore designated and be added to and increased, the respective annuities in the same manner and in the proportion of their respective legacies respectively," does not appear to be open to any other interpretation. So long, therefore, as any one of the children of Margaret Wilson or of Edward Wilson remains alive that child is entitled to his or her proportionate share (as determined by the dispositions of articles 4, 5 and 6) in the whole net revenue of the estate after provision has been made for the fixed annuities given by other clauses of the will.

Since it is the whole of the net revenue which is thus dealt with by the will, and since by article 2 it is the whole of the estate which is vested in the fiduciary universal legatees and their successors in trust for the purposes of the will, " to be by them administered, dealt with, converted, invested, used and disposed of as hereinafter expressed concerning same," it would appear to follow that unless there be some provision in the will or some consideration to be derived from an examination of the testament as a whole or some rule of law which has the effect of qualifying the primary meaning of these provisions governing the application of this income, there cannot consistently with the due observance of them be a partition of the estate so long as any of such children remains alive.

It is article 16 upon which the respondent relies as the governing provision. But that article does not, as it appears to their Lordships, disclose the intention ascribed to the testator by the respondent's argument that any grandchild within the class entitled under it shall, on attaining his or her majority, " enter upon the ownership " of his or her share ascertained by reference to the number and rights of the members of the class then in being. This view fails, they think, to recognize the bearing and weight of parts of article 16, which cannot be disregarded, and of the second paragraph especially.

That paragraph explicitly declares that the gift of the corpus " is subject to all the annuities and legacies in this will given," a declaration which seems clearly enough to manifest an intention that the gift of the corpus shall not operate in such a way as to prevent the trustees executing the trust for investment and the directions for the disposition of the income of the estate found in the earlier paragraphs of the will. Nor does it appear that this declaration is affected by the second branch of the sentence ; for the words " until such time as my executors have provided for or laid by a sufficient sum for the annuities which shall then be still payable " are words which do not appear to contemplate a provision for securing annual payments of unascertained amount (aliquot shares of the whole net income), but seem more appropriate in relation to annuities of fixed and ascertained amounts.

This indeed was not controverted in the argument before their Lordships' Board. But it was contended, as already mentioned, that this direction, while it requires provision to be made for

the annuities given to Margaret Wilson, Anna Maria Wilson and the children of Edward Wilson, has no reference to the residuary revenue disposed of by article 11.

As already observed, their Lordships think the residuary revenue under article 11 goes by force of that article to enhance the annuities last mentioned, and they consider that no distinction is possible for the purpose of applying this clause of article 16 between the share of a beneficiary in any of the fixed annual sums bequeathed by articles 4, 5 and 6 and the share devolving upon the same beneficiary in the residuary revenue under the distribution directed by article 11 ; and their Lordships' opinion is that this clause does not contemplate provision for the annuities arising under articles 4, 5 and 6, but that it is most naturally construed as making provision for those given by article 8. Their Lordships accordingly agree with the view of Tellier and Howard JJ. that the right to immediate partition claimed by the respondent and conceded to her by the Courts of Quebec cannot be maintained consistently with what their Lordships think is the undoubted right of the annuitants, the children of Margaret Wilson and of Edward Wilson to enjoy their respective shares in this surplus during their lives.

Their Lordships are unable to accept the view expressed in the *considérant* quoted from the formal judgment of Surveyer J. that Article 689 of the Civil Code contains a disposition to which effect must be given by decreeing partition notwithstanding the terms of the will. The provisions of the Articles of the Civil Code beginning with 981A are unquestionably sufficient to enable testators to provide effectively for the vesting of their estates in trustees as depositaries and administrators for the purposes of the trust and for the benefit of the legatees designated by the testator and to empower such trustees to retain the property for the " time stipulated for the duration of the trust," and to administer the property during that time for the purposes of the trust " without the intervention of the beneficiaries." Their Lordships can entertain no doubt that where, as in this case, property is given to trustees for investment, and the trustees are required to pay the income derived therefrom to designated persons during a limited period, there is nothing in the article relied upon entitling one of the ultimate beneficiaries to whom the corpus of the estate is given to insist upon a partition which would defeat the intention expressed by the will as to the disposition of the income.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the action dismissed. The costs of the appellants and of the respondent to be taxed as between solicitor and client in the Privy Council, and the costs of all necessary parties in the Courts below are to be paid out of the estate

In the Privy Council.

SIR ALEXANDRE LACOSTE AND OTHERS

v.

DAME MARY M. DUCHESNAY

AND

PHILIPPE DUCHESNAY AND OTHERS.

DELIVERED BY MR. JUSTICE DUFF.

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