Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Prévost and others v. *Prévost and others, from the Supreme Court of Canada ; delivered the 31st July* 1908.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ROBERTSON.
LORD ATKINSON.
SIR ARTHUR WILSON.
SIR HENRI ELZÉAR TASCHEREAU.

[*Delivered by Lord Atkinson.*]

This is an Appeal from a judgment of the Supreme Court of Canada, dated the 15th November 1906, reversing the judgment of the Superior Court sitting in Review at Montreal.

The action was instituted by Armand Prévost and Adèle Prévost, two of the children of Amable Prévost, deceased, to obtain partition of the portion of their father's estate which their brother, Louis Roméo Prévost, deceased, took under their father's will of the 24th December 1844.

Amable Prévost died in 1872, leaving seven children him surviving. Louis Roméo Prévost died without issue in 1902. The Defendants were three of the children of Amable Cyprien Prévost, a son of Amable Prévost, some formal parties, and Valmore Lamarche, the executor of the will of Louis Roméo Prévost.

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The point in controversy is, whether the share of Amable Prévost's property, taken under his will by his son Louis Roméo Prévost, passed under the latter's will subject to a conditional substitution created by a codicil to his father's will, or whether there is, under the terms of that will, by virtue of the provisions of the Quebec Civil Code, an accretion, in favour of the children and grandchildren of the original testator, of the said share of his son Louis Roméo Prévost.

In order to avoid disputes among the beneficiaries under Amable Prévost's will, a deed of partition, dated the 27th April 1883, was executed by them, by which the testator's estate was divided into seven shares. Some question as to the validity of this partition having apparently arisen, an action was instituted for partition. It came on for trial before Jetté, J., who decided that the partition made by this deed was final and definitive. Thereupon an Act (60 Vict. c. 95) was passed by the Legislature of Quebec (to which more detailed reference will be made hereafter) giving to "any of the parties interested" a right of appeal from the decision of Jetté, J., to the Court of Queen's Bench. An appeal was subsequently taken and the judgment of Jetté, J., affirmed.

There are thus, really, only two questions for decision: (1) What, according to the provisions of the Quebec Civil Code, is the true construction of a certain clause in the will of Amable Prévost?

(2) How far, if at all, is the operation of that clause modified by the provisions of the above-mentioned Act of the Legislature of Quebec?

The clause of the will runs as follows:—

" 3° Je donne et lègue à l'enfant né et aux enfants
" à naître de mon mariage avec Dame Rosalie
" Victoire Bernard, mon épouse actuelle, la jouis-
" sance et usufruit leur vie durant de tous les biens
" meubles et immeubles propres, acquêts, conquêts,
" argent monnoyé et non monnoyé, dettes actives,
" droits et actions mobiliers et immobiliers et autres
" choses généralement quelconques que je délaisserai
" et qui m'appartiendront aux jour et heure de mon
" décès, quelques en soient la valeur, consistance,
" qualité. valeur et situation sans aucune réserve ni
" exception pour mon dit enfant né et les enfants à
" naître de mon dit mariage, jouir à titre d'usufruit
" de mes dits biens leur vie durant à toutes les
" charges ordinaires aux usufruitiers, pour la pleine
" propriété de mes dits biens appartenir après le
" décès de mes dits enfants ou d'aucun d'eux aux
" enfants qui naîtront de leur mariage respectif et
" pour par mes petits-enfants substitués à mes dits
" enfants au moyen des présentes, au regard de mes
" dits biens jouir, user, faire et disposer des susdits
" biens comme bon leur semblera, les instituant à
" cet effet mes légataires universels.

" Je veux comme condition expresse et absolue
" du legs d'usufruit par moi fait à mon dit enfant
" né et aux enfants à naître de mon dit mariage, de
" mes susdits enfants 1° que les loyers, rentes,
" revenus et intérêts de mes dits biens à eux ainsi
" légués en usufruit soient touchés et perçus par
" mes dits enfants respectivement pour leurs aliments
" et entretien et ceux de leurs enfants et qu'en
" conséquence les dits loyers, rentes, revenus et
" intérêts ne soient cessibles ni saisissables par
" aucuns de leurs créanciers pour quelques causes et
" raisons que ce puisse être ; 2° que mes biens-fonds
" ou immeubles de quelques nature et qualité qu'ils
" soient passent en nature à mes dits petits-enfants et
" qu'en conséquence ils ne puissent être en tout ou
" en partie vendus ou aliénés par quelque autorité
" que ce soit ni sous quelque prétexte que ce puisse
" être, même sous celui du plus grand avantage de
" mes dits petits-enfants, car telle est mon expresse
" volonté à cet égard.

Some light is thrown upon the intention of the testator as expressed in this clause by a subsequent clause of the will, which must be considered in connection with the first-mentioned clause. It runs as follows : —

> " Je veux aussi comme condition expresse et
> " absolue du legs par moi fait en propriété à mes
> " dits petits-enfants de mes susdits biens qu'ils, mes
> " dits petits-enfants ou aucun d'eux, ne puissent
> " ou puisse sous aucun prétexte et pour quelque cause
> " que ce soit vendre, aliéner, engager ou hypo-
> " théquer leur part ou leur droit ou sa part et ses
> " droits dans mes dits biens avant l'extinction de
> " l'usufruit d'iceux par moi légué à mes dits enfants
> " ou de la part de mes dits biens qui se trouvera
> " appartenir en usufruit au père ou à la mère de mes
> " dits petits-enfants respectivement."

The testator, thus, in the opening words of the first-mentioned clause, expressly bequeaths to the children born and to be born of his marriage with his then wife the usufruct and enjoyment of all the property he should die possessed of during their lives ; and on the decease of his said children, or any of them, he bequeaths the full proprietary right and interest in the said property to the children to be born of their respective marriages ; and he then gives to his grandchildren, thus substituted by his will for his children, as regards his said property, the right to use, enjoy, or dispose of the same as it might seem good to them, instituting them for this purpose his universal legatees. He then attaches two conditions: (1) that the property so bequeathed to his children in usufruct shall not be assignable, or capable of being seized by their creditors ; and (2) that the property bequeathed by him, whether movable or immovable, shall not be sold or alienated under any pretext, but shall pass " en nature " to his grandchildren.

From the second of the above-mentioned clauses it is evident that the testator desired to deprive his grandchildren of the right of anticipatory alienation of the property bequeathed by him. He does this, however, by providing that the grandchildren shall not alienate, before the usufruct of those to whom he has bequeathed his property has come to an end, the part or share of the property which should belong in usufruct to their respective fathers or mothers.

If the testator intended that there should be a right of accretion among his children or grandchildren, it would, in order to carry out his intention of preventing premature alienation, have been necessary for him to deprive his grandchildren of the power of alienating by anticipation, not only the shares of their respective fathers or mothers, but the shares which might accrue to them as well. The absence of any provision in this clause dealing with accrued shares suggests strongly that he never meant that there should be any accretion. Their Lordships, therefore, think that, on the true construction of these two clauses, the intention of the testator's will was that the property bequeathed by him should be, as it were, divided into shares according to the number of his children, one share for *each child*, and that this was the share of which each child was to enjoy the usufruct during his life, and which was to be handed over to that child's children on the former's death.

This appears to their Lordships to be the construction of the testator's will adopted by the Legislature of Quebec and, in effect, declared, in the Act they have passed, to be its proper construction. For the Act not only provides

that the division into shares of the property bequeathed, already made by Jetté, J., or thereafter to be made by the Court of Appeal, is to be final, but enacts that :—

> " The legatees who are institutes in the substitution " established by the said late Amable Prévost are " declared to be and always to have been the sole " proprietors of the share of the said property which " has respectively devolved to them under the terms " of the said deed of partition and liquidation, subject " to the condition of handing over such share to their " children at their death, as set forth in the said " will and codicils ; and the children, issue of the " marriage of the said Amable Oscar Alexandre " Prévost with the said Dame Marie-Louise Duches- " nay are declared to be and always to have been, " since the death of their father, the sole owners of " the property which devolved to the said late " Amable Oscar Alexandre Prévost in virtue of the " said partition."

This seems inconsistent with the idea of a gift either to the children or grandchildren as a class.

It was urged on behalf of the Defendants that this construction of the will is in conflict with the following provision of the codicil, dated the 26th December 1844, which Amable Prévost added to his will :—

> " Je veux et entends que si l'enfant né et les " enfants à naître de mon mariage avec Dame Rosalie " Victoire Bernard, mon épouse, décèdent tous sans " laisser d'enfants ni descendants légitimes, avant " cette dernière, la dite Rosalie Victoire Bernard, ma " dite épouse, ait tant qu'elle gardera viduité de " jouissance et usufruit de tous les biens meubles " et immeubles, argent monnoyé et non monnoyé, " dettes actives et autres choses généralement quel- " conques que je délaisserai et qui m'appartiendront " aux jour et heure de mon décès, de quelques " nature et qualité qu'ils soient et en quelques

" lieux qu'ils se trouvent assis et situés, à l'excep-
" tion toutefois de la terre avec maisons, bâtiments
" et dépendances, que je possède à Terrebonne, que
" je lègue au dit cas à Louis Joseph Prévost, mon
" frère, en pleine propriété, et pour mes autres biens
" meubles et immeubles après l'extinction de l'usufruit
" que j'en ai ci-dessus légué à ma dite épouse tant
" qu'elle gardera viduité, retourner et appartenir au
" dit Louis Joseph Prévost et à Dame Eldwidge
" Prévost, épouse de Sieur Séraphin Bouc et Delle
" Anathalie Prévost, mes sœurs, s'ils sont vivants,
" sinon à leurs enfants, pour par eux en jouir, user,
" faire et disposer en pleine propriété au moyen des
" présentes, les instituant au dit cas mes légataires
" universels, qui partageront entre eux ces derniers
" biens également, sans que le dit Louis Joseph
" Prévost soit tenu à faire aucun rapport relative-
" ment à la dite terre, avec maisons, bâtiments et
" dépendances que je lui ai au dit cas ci-dessus
" léguée."

But there is not, really, any conflict, because if the substitution to the several shares never opened, either by reason of the several institutes never having had children at all, or having died without leaving any descendants living at the time of their respective deaths, the several shares would pass to the widow in case she should survive all the children, to be enjoyed by her during her widowhood. It is, however, quite true that, if six of the children of the testator died without children or other descendants, and one of them died leaving a son living at his decease, only one-seventh of the property of the testator would pass to that son instead of the whole. It may possibly be that this is not in accord with the real intention of the testator, but that is a matter of conjecture. If he entertained the intention that there should be accretion amongst his grandchildren, and that, in such a case as that above-mentioned, the one grandson who survived all his children should

take the whole property, he has, in their Lordships' opinion, as well, indeed, as in the opinion of the Legislature of Quebec, failed to use language to express it.

The next matter to consider is the effect of this construction of the will on the devolution or enjoyment of the share of Roméo Prévost. According to Article 944 of the Quebec Code the institute holds the property as proprietor subject to the obligation of delivering it over, without prejudice to the rights of the substitute. According to Article 928 this may be so, though the term "usufruct" be used to express the right of the institute. Article 957 provides that the substitute who dies before the opening of the substitution in his favour does not transmit any right to his heirs. In the case of Roméo Prévost the substitution never opened, and never can open, unless all his brothers and sisters should die without leaving children or other descendants living at their decease, when, according to one contention, it would open in favour of the widow and the others named in the codicil. He has made a will by which he has bequeathed an annuity to his reputed wife, and left the residue of his property to his brothers and sisters and their survivors. In the opinion of their Lordships the share of Louis Roméo Prévost does not pass by substitution either to his brothers and sisters or to his nephews and nieces, but is captured by his will and passes to his executor. They will, therefore, humbly advise His Majesty that the Appeal ought to be allowed, the Judgment of the Supreme Court reversed with costs, and the Judgment of the Court of Review restored.

The Respondents must pay the costs of the Appeal.