Privy Council Appeal No. 28 *of* 1931.

Dame Camille Rolland and another - - - - - - *Appellants*

v.

Stanislas Jean-Baptiste Rolland and others - - - - *Respondents*

Stanislas Jean-Baptiste Rolland and others - - - - *Appellants*

v.

Dame Camille Rolland and another - - - - - - *Respondents*

(*Consolidated Appeals.*)

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 23RD OCTOBER, 1931.

Present at the Hearing :

LORD BLANESBURGH.
LORD MERRIVALE.
LORD WARRINGTON OF CLYFFE.
LORD THANKERTON.
SIR JOHN WALLIS.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

The appellant (Dame Camille Rolland who with her husband was plaintiff in the action) is one of the grandchildren and the respondents are the surviving children and certain of the other grandchildren of one J. B. Rolland and his wife, including those of them who are at present trustees and executors of his will.

Two main questions of construction are raised. First, whether the plaintiff C. Rolland as a child of a deceased son of the testator is entitled to any and, if any, what interest in the share of income formerly enjoyed by her father? Secondly, what under the circumstances is the true effect of a direction in the will that certain "avancements d'hoirie," stated by the testator to have been made by him to his children, were to be brought into hotchpot, as we should express it, by the children to whom they had been made. The expression in French is

"en par chacun d'eux faisant rapport à la masse de ma succession du montant qu'ils auront reçu en avancement d'hoirie de ma succession."

The actual question on this second point is whether the several advancements are to be treated as so much cash, and the obligation imposed upon the children is to be limited accordingly, or whether they are to be treated as shares in a family company, the value of which enormously exceeds the amount of the cash referred to above. Both Courts

in Canada have held that the obligation is limited as above mentioned, and the original appeal is from this decision. On the first point both Courts decided in favour of the appellant. The respondents entered a cross-appeal on this point, but, as will hereinafter appear, they did not press it at the hearing before the Board.

J. B. Rolland for a considerable time prior to 1882 had been engaged in the business of a paper manufacturer. In that year he caused the business to be converted into a limited company under a Quebec statute, 45 Vict. c. 77, with a nominal capital of $300,000, divided into 3,000 shares of $100 each. He then entered into an agreement with the Company for the sale to them of all his interest in the paper business for the sum of $100,000, payable in cash by the following instalments, viz., $40,000 on the 14th October, 1882, $20,000 on the 15th November, 1882, $20,000 on the 15th December, 1882, and $20,000 on the 15th January, 1883. The Company was called "La Compagnie de Papier Rolland."

At this time J. B. Rolland and his wife had eight children—four sons and four daughters—some of whom were married and had children.

The $100,000 payable to J. B. Rolland by the Company under the agreement for sale and purchase was, as the result of a transaction the details of which it is unnecessary to state, used by him to subscribe in full for shares in the Company, viz., 200 shares in his own name and 100 in the name of each of his eight children. The amount of cash thus provided was $10,000 for each child, and this sum was subscribed by instalments severally paid at the dates mentioned below. It is important, as their Lordships think, to note that although with a similar result the sale of the business might have been expressed to be for 1,000 shares fully paid to be allotted as Mr. Rolland might direct, the transaction did not take that form, but was a sale for cash and a subscription with money provided by the vendor for shares of the same nominal amount.

Mr. Rolland and his wife at various dates in May and June, 1885, obtained from each of his children then of age an acknowledgment in the following form :—

> Je, soussigné, reconnais avoir reçu de M. J. B. Rolland et de Dame Esther Boin dit Dufresne, mes père et mère, en avancement d'hoirie sur leurs successions futures, la somme de Dix mille dollars en cinq paiements de Deux mille dollars chacun, étant pour cinq versements au fonds capital souscrit dans la Compagnie de Papier Rolland, dont le premier paiement a eu lieu le trente septembre mil huit cent quatre-vingt-deux 1882
>
> Le second, le quatorze octobre 1882
>
> Le troisième, le quinze novembre 1882
>
> Le quatrième, le quinze décembre 1882
>
> Le cinquième, le quinze janvier mil huit cent quatre-vingt-trois 1883
>
> Sujet aux dispositions testamentaires de mes dits père et mère.

He also signed a similar form on behalf of a daughter who was still an infant.

He then deposited the eight acknowledgments with a notary under a deed of deposit dated the 13th November, 1885.

Under these circumstances Mr. Rolland and his wife, who had been married under communauté de biens, each made a will dated the 13th November, 1885. These wills were identical in terms except, of course, that the provision for his surviving wife in his will became one for her surviving husband in hers. It is only necessary to refer to the terms of the husband's will.

The will contained the following material provisions :—

(The numbers in the margin against the several paragraphs are those used by counsel in argument. There are no numbers in the original will.)

5. Je donne et legue à ma tendre et bienaimée épouse, Dame Esther Bouin dit Dufresne, la jouissance et usufruit sa vie durant, sans être tenue de donner aucune caution, de tous les biens, meubles et immeubles, parts ou actions de Banques, Compagnies ou institutions, argent monnoié et non monnoié, dettes actives, cedules, obligations et autres choses généralement quelconques qui m'appartiendront au jour de mon décès, de quelques nature, qualité et valeur qu'ils soient et en quelques endroits qu'ils se trouvent dus et situés, sans en rien excepter ni réserver, mais aux charges et conditions ci après imposées et exprimées, savoir :

6. De jouir de mes dits biens en " bon pére de famille " afin de les rendre après la dite jouissance éteinte à nos enfants communs nés de notre mariage, que je lui substitue a la dite jouissance et usufruit, comme il sera ci après mentionné. . . . .

9. De payer a chacun de nos enfants non mariés, lors de leur mariage ou établissement, une somme de mille piastres, cours actuel du Canada, pour être employée à l'ameublement de leur maison.

10. Cette somme de mille piastres à être payée à chacun de nos enfants, non mariés, lors de son mariage ou établissement, sera prise sur et à même les revenus de mes biens.

11. Je declare avoir dejà payé a mes enfants mariés chacun une pareille somme de mille piastres, dit cours.

13. Et après l'extinction de la dite jouissance et usufruit, de mes biens donnés et légués ci dessus à ma dite épouse, je veux et entends que ces mêmes jouissances et usufruit retournent et appartiennent à mes enfants qui seront alors vivants, par parts et portion égales entre eux, en par chacun d'eux faisant rapport à la masse de ma succession du montant qu'ils auront reçu en avancement d'hoirie de ma succession, attendu que mon intention est de conserver une parfaite égalité entre mes dits enfants ; et ces jouissance et usufruit seront sujets aux mêmes charges et obligations imposées à ma dite épouse. . . .

14. Je fais le dit legs de jouissance et usufruit de mes biens à mes enfants pour leur servir et tenir lieu d'aliments à eux et à leurs enfants ; en conséquence je leur fais défense expresse d'aliener, vendre, transporter et engager en aucune manière quelconque les dits jouissance et usufruit, sous quelque prétexte et pour quelque cause que ce soit et puisse être, voulant et entendant que ces jouissance et usufruit soient incessibles et insaisissables tant qu'ils dureront. . . .

15. Je veux et entends que la part du capital que j'aurai dans la maison de commerce J. B. Rolland & Fils lors de mon decès et du decès de ma dite

épouse appartienne en part égale a chacun de mes quatre fils ou héritiers, sans qu'ils soient tenus d'en rendre compte ni en faire rapport à ma succession, vu que je veux leur en faire don et remise en consideration de ce qu'ils ont coopéré à m'aider à réaliser le capital que j'ai pu ou pourrait avoir accumulé lors même que je m'occupais qu'indirectement des affaires du magasin. . . .

21. Quand a la propriété des mes biens, je la donne et lègue à mes petits enfants nés et à naître en légitimes mariages de mes enfants au premier degré ; pour par eux en jouir, faire et disposer en pleine et absolue propriété comme bon leur semblera et de chose . . . à eux appartenant, et en faire le partage entre eux par parts et portions égales par têtes et non par souches, voulant et entendant que mes petits enfants partagent les biens de ma succession, et telle est ma volonté expresse ; mais sous la condition que mes petits enfants ne pourront pas faire ce partage ni vendre, transporter ou aliener leurs parts dans mes biens qu'apres le decès de tous mes enfants au premier degré ; auquel temps seulement mes petits enfants auront des droits acquis dans mes biens ou dans les biens qui les représenteront.

22. Si aucun de mes enfants mourait sans laisser d'enfants légitimes, ou s'il laissait des enfants qui mourraient en minorité sans enfants légitimes, alors je veux et entends que la part de mon dit enfant ainsi décédé retourne et appartienne a mes autres enfants au premier degré en jouissance et usufruit pendant leur vie comme de leur propre part, et ensuite retourne et appartienne en pleine propriété à mes petits enfants par parts et portions égales entre eux, et ce par têtes et non par souches, entendu toujours qu'après le décès de tous mes enfants au premier degré comme le partage de mes autres biens. . . .

29. Je declare par mon présent testament avoir fait un avancement d'hoirie de ma succession future et de la succession future de ma dite épouse, de la somme de dix mille piastres, dit cours, à chacun de nos enfants en cinq paiements de deux mille piastres chaque, étant pour cinq versements au fond capital souscrit dans la Compagnie de Papier Rolland, dont le premier paiement a eu lieu le trente de Septembre mil huit cent quatre vingt deux, le second paiement le quatorze d'Octobre suivant, le troisième paiement le quinze de Novembre suivant, le quatrième paiement le quinze de Décembre suivant et enfin de cinquième paiement le quinze de Janvier suivant, le tout sujet a mes dispositions testamentaires de mon présent testament ainsi qu'a celles du testament de ma dite épouse.

Duquel avancement d'hoirie une reconnaissance a été donnée par chacun de mes enfants, savoir :

Par Stanislas Jean Baptiste Rolland en date du vingt et un de Mai dernier (1885).

Par J. D. Rolland en date du vingt six de Mai dernier (1885).

Par Ernestine Rolland épouse de J. L. Archambault en date du vingt six de Mai dernier (1885).

Par Prisque D. Rolland en date du vingt sept de Mai dernier (1885).

Par Oct. Rolland en date du vingt sept de Mai dernier (1885).

Par Hermantine Rolland épouse de R. Prefontaine en date du trente de Mai dernier (1885).

Par Lumina Rolland épouse d'Auguste Achille Foucher en date du trente de Mai dernier (1885).

Et enfin par moi Testateur pour ma fille mineure Marguerite Eugenie Euphrosine Rolland en date du dix sept de Juin dernier (1885).

Toutes ces reconnaissances sont signées en présence de L. Labrie, Secretaire Tresorier de la Compagnie de Papier Rolland et sont déposées pour minutes dans le Notariat de J. E. O. Labadie l'un des Notaires soussignés suivant acte de Depot par moi et ma dite épouse devant le dit Mtre. J. E. O. Labadie, Notaire, en date de ce jour.

30. Je veux et entends que les vingt mille piastres que j'ai dans le fonds capital de la Compagnie de Papier Rolland soient divisés en quatre parts égales de cinq milles piastres chaque, a mes quatre fils, leur faisant quinze mille piastres de parts à chacun d'eux dans la dite Compagnie, sans par eux être tenus de faire rapport des dits cinq mille piastres que je leur donne et lègue a titre d'indemnité pour la part d'activité et services par eux déjà rendues et qu'à l'avenir ils devront rendre à la dite Compagnie de Papier Rolland pour le maintient et succès d'icelle.

31. Je veux et entends que les dites parts en avancements d'hoiries soient incessibles et insaisissables, comme mes autres biens provenant de ma succession, vu que les dividendes de la Compagnie de Papier Rolland devront servir comme revenu alimentaire a mes dits heritiers, qui ne pourront vendre, ni transporter leurs parts du fonds capital de la dite Compagnie, sans le consentement de mes dits Executeurs testamentaires administrateurs et fidei commissaires afin qu'ils puissent juger de l'opportunité d'un changement de placement du montant ou partie des dites parts ; mais en cas de vente ou transport des dites parts par ceux de mes heritiers ou légataires qui en obtiendront la permission de mes executeurs testamentaires, administrateurs et fidei commissaires, elle ne pourront être vendues ou transportées qu'à la Compagnie de Papier Rolland pour elle même. . . ."

Mr. Rolland died on the 22nd March, 1888, and his wife on the 26th October, 1892. All the eight children survived the testator and his wife.

The first appellant's father, Donatien Rolland, died on the 3rd June, 1907, leaving three children, of whom that appellant is one. The three children were minors and their mother as tutrix and on their behalf renounced succession to their father.

After the death of the testator the shares in the Rolland Paper Company, as a consequence of certain transactions which it is unnecessary to recount in detail, increased very considerably in value and ultimately realised a sum far exceeding the nominal value of $100 per share. The appellant contended in both Courts in Canada and before this Board that the advancement made by the testator should, for the purposes of the rapport or, as we in England should say, the hotchpot provisions of the will, be treated not as $10,000 for each child, but as 100 shares in the Company, and that the accounts rendered necessary to ascertain the exact rights of the several parties ought to be taken on that footing. As this is the point raised by the original appeal, their Lordships propose to deal with it before the first of the two points mentioned above, which is the point raised by the cross-appeal.

On the facts as stated in the will and in the contemporary documents it appears to their Lordships to be clear that the shares subscribed for in the names of the several children never were the property of the testator and would not, if the advancement had not been made, have formed part of his "succession." The money, on the other hand, with which they were paid for was his own and he could do as he pleased with it. He chose to invest it in shares on his children's behalf, but that fact by itself could not turn the advancement from one in cash to one in shares.

It is necessary therefore to turn to the testator's will to determine whether or not he has directed that the advancement

should be treated as of a nature different to that of an advancement in cash. The matter of advancement is first treated of in para. 13 of the will set out above. In this para., after the determination of his wife's usufruct, he directs in effect that the same usufruct should belong to his then surviving children in equal shares, "en par chacun d'eux faisant rapport à la masse de ma succession du montant qu'ils auront reçu en avancement d'hoirie de ma succession, attendu que mon intention est de conserver une parfaite égalité entre mes dits enfants." It is noticeable that this clause has no reference to any particular advancement, but refers to advancements in general, and the expression "du montant qu'ils auront reçu" seems to their Lordships to indicate that he is here referring to advancements in terms of cash. He then in clause 15 excepts from the hotchpot provision the shares of his sons in a partnership firm of J. B. Rolland et Fils and gives these shares to the sons absolutely.

The particular advancement in question is referred to definitely in clause 29. The testator there declares that he has made an advancement "de la somme de dix milles piastres, dit cours, à chacun de nos enfants," and he repeats the facts relating thereto as stated in the several acknowledgments above referred to. So far it would, in their Lordships' opinion, be impossible successfully to contend that the testator intended the advancements in question to be treated as anything but, what they were in fact, advancements in cash. He gives no special directions as to how they are to be dealt with and they would therefore come under the general direction in clause 13.

Two other clauses, however, are relied on by the appellants. The first is clause 30, in which the testator gives "les vingt mille piastres que j'ai dans le fonds capital de la Compagnie de Papier Rolland" to his four sons in four equal parts of $5,000 each, making up for each of them $15,000 of shares in the Company, and he excepts the $5,000 from the liability "de faire rapport" and gives them to his sons as a reward for their services. In their Lordships' opinion this clause has really no bearing on the questions for decision. The testator here quite naturally refers to the subject of his bequest by the nominal value of the shares and, having done so, he as naturally refers in the same terms to the shares already held by the sons, but the clause contains no indication that for the purposes of advancement any other than the nominal value of the shares, viz., the sum expended in the subscription for them, is to be brought into account.

The second of the two clauses is No. 31. It is unnecessary to repeat it in full. Its object is obviously to impose, as far as the testator could, a limited restraint on alienation upon the shares in the Company. It is true that he describes them as "les dites parts en avancement d'hoiries," but the effect of the words "les dites parts" is to refer one back to clause 29, in which the true facts are stated and by which it appears that the shares in question were not in themselves an advancement, but were

procured by the testator by the cash payments therein mentioned. In their Lordships' opinion this clause does not support the appellants' contention and the decision of the Courts below is therefore correct.

There remains the subject of the cross-appeal, viz., the question whether on the true construction of the will the first appellant, as the child of a deceased son of the testator, is entitled, pending the coming into operation, on the death of the last surviving child of the testator, of the gift of the "propriété de mes biens" to the grandchildren per capita, to a share of the revenues of the estate. The counsel for the appellants in the cross-appeal, on hearing from their Lordships that they were prepared to dismiss the original appeal, announced that after consultation with his opponent he would not open the cross-appeal and would submit to its being dismissed provided the costs of it were paid out of the estate. This was assented to by counsel for the original appellants, and, though counsel for the appellants in the cross-appeal said that he could not consent to the same order as to the costs of the original appeal, he raised no objection thereto.

The point was very thoroughly dealt with by the appellants' counsel, and their Lordships had the benefit of reading the opinions of the learned Judges in the Courts below. On these materials their Lordships think it right to say that, in the absence of arguments by the cross-appellants, they would be prepared to accept the views expressed in the Courts below. That is to say that the usufruct of each child continues to be enjoyed by his children until the coming into effect of the ultimate gift on the death of the last surviving child. This view is supported, first, by the words of clause 12, in which there is no limitation of the children's usufruct to their respective lives in contrast to the provisions for the widow, which is "sa vie durant"; secondly, by those of clause 14, in which the testator says that he makes the gift of usufruct to his children "pour leur servir et tenir lieu d'aliments à eux et à leurs enfants," an object certainly not less necessary after the parent's death than it was in his lifetime; and, thirdly, that in clause 22 the testator expressly provides for the accruer to the other children of the share in usufruct of any child who dies without leaving any children or leaving children who die during minority without children, and makes no further provision for the case of a child who dies leaving children.

For the reasons above stated their Lordships are of opinion that the original appeal and the cross-appeal should both be dismissed and the judgment of the Court of Appeal should be affirmed.

The costs of all parties to the appeal and the cross-appeal should be paid out of the estate. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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