Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William Muir et al. v. *James Muir from the Court of Queen's Bench, Quebec, Canada; delivered 9th December*, 1873.

Present :

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THE questions to be determined on this appeal arise on the will of Ebenezer Muir, late of Montreal, who died on the 12th of January, 1866. The instrument, which bears date the 23rd of May, 1857, is made in notarial form ; and the construction of its provisions, and the effect to be given to them, must, as both sides admit, be governed by the law of Lower Canada.

The material clauses are, in effect, as follows :—

By the first of these the testator bequeathed the whole residue of his property (to use his own words) "in trust unto my beloved sons, William Muir, George Barclay Muir, and James Muir, the survivors or survivor of them, that the said trustees shall reduce the same into possession without delay."

The next, after declaring that it should be the duty of the trustees to perform certain specified acts of management or administration, to defray the expenses thereof, and to pay out of the then net annual proceeds an annuity to the testator's wife (who pre-deceased him), proceeded as follows : — "The remainder of the said annual revenue to divide and pay to the whole of my

children, issue of my marriage with the said Jane Steel, or their lawful issue surviving, share and share alike, *par souche*, yearly and every year, by quarterly payments, until the youngest of my grandchildren shall have attained the age of majority, and upon the accomplishment of the majority of my youngest grandchild the whole of the immovable part of my estate, rest, residue, and remainder thereof, shall then be sold; and as soon as my entire estate can be converted into cash, the same shall be divided between the said children who may be then alive, or their lawful issue, representing them in full property, share and share alike, *par souche*, in the order in which successions are divided in this country."

Then follows a very material clause in these words:—

"And I do hereby declare it to be my will and desire that the revenue of my estate is bequeathed, and intended to be bequeathed, unto my beloved wife and children, and the lawful issue of the latter as an alimentary pension or allowance until the accomplishment of the majority of my youngest grandchild as aforesaid, and the said alimentary allowance shall not be sold, mortgaged, or made away with by anticipation by them, or either of them; nor shall it be subject to seizure or other contingencies to which personal or other property is subject, but shall be paid to them only as an alimentary allowance."

By subsequent clauses the testator declared his will to be that, in the event of any one or more of his children dying unmarried, or dying married, but without issue, or such issue predeceasing them, the share of the party so dying, either in the revenue or capital, should revert and fall into the mass of his estate and be divided between the survivors or survivor of them, or their lawful issue as aforesaid, share or share alike; and, further, that William Muir should be chief manager of the estate, and receive a commission for his trouble; and that the trustees should be also executors, and should continue in office as executors and administrators even beyond the day and year limited by law.

The testator left several children and grandchildren besides his three sons and trustees above named; the state of the family being such that,

under the provisions of the will, the annual income of his residuary estate was, on his death, divisible into ten shares, and continued to be so up to the commencement of this suit; at that time, also, his youngest grandchild was still under age.

Of the persons thus entitled to participate in the income of the residue, five, including the three trustees, were indebted to the estate; the aggregate of their debts amounting, it is said, to one-third of the whole residue. The only one of their debts which it is necessary to particularize is that of James, the Respondent. At the date of his father's death he was indebted to the estate upon an overdue promissory note for 2,200 dollars, with interest; and he was also liable upon fifteen promissory notes for 350 dollars each, which had been made by him to the order of and indorsed by his father. Of the latter he took up six, leaving the estate liable for the remaining nine; and at a meeting of the trustees, held on the 7th of April, 1866, it was arranged that these nine notes, amounting together to 3,150 dollars, should be taken up and paid by the estate, which was afterwards done; that the amount paid on them, and costs, should be held as a claim against the Respondent, upon the terms of his signing an agreement to pay interest thereon at the rate of 7 per centum per annum quarterly, depositing a policy of insurance on his life by way of collateral security, and undertaking to keep up the said policy.

Up to the 1st of June, 1868, the income of the residue was, in point of fact, dealt with in the following way:—The manager included in his computation of the income the interest due from the Respondent and the other participators who were indebted to the estate, and, after paying the several outgoings payable under the will, divided the net income so calculated amongst the ten participants, but retained the instalments due to such of them as were indebted to the estate, setting off each instalment against the debt of the party indebted, first in satisfaction of the interest, and next in diminution of the principal. To this arrangement the Respondent appears from the first to have objected: but he submitted to it on four occasions, signing receipts for the instalments so applied. The last receipt was dated the 1st of

June, 1868. The result of these transactions was to reduce his gross debt to 5,200 dols. 20 c.

On the 18th of February, 1868, the Respondent took the benefit of the "Insolvent Act of 1864" of Lower Canada, and received his discharge on the 31st of March in that year. He did not, however, insert in the schedule of liabilities his debt to his father's estate.

After the 1st of June, 1868, the Respondent refused to acquiesce in the before-mentioned arrangement, and insisted on his right to receive his share of the annual income of his father's residuary estate as an alimentary provision; and on the 14th of April, 1869, he commenced his suit against the Appellants for the recovery of the three quarterly instalments which had accrued due to him on the 1st of September, 1868, the 1st of December, 1868, and the 1st of March, 1869.

It is possible that to the form of this action, which is peculiar, exceptions might have been taken. None, however, was taken in the Courts below; and it has fairly been conceded at the Bar, that their Lordships need not concern themselves with objections of form, but may determine the case on its merits.

The defence actually made by the Appellant consisted of four pleas, each going to the whole action, viz: a plea of compensation; one of return or rapport; one of payment, and the *Défense au fond en fait.*

The cause was first decided by the Superior Court, which gave Judgment in the Plaintiff's favour, on the 30th of November, 1869. The Judgment, which is on page 5 of the Record, ruled that the Plaintiff was not bound to suffer the compensation claimed by the Defendants, and was not bound to make at present, and so as to vacate or diminish his claim in this cause, the rapport claimed by the Defendants by reason of the Plaintiff's indebtedness to the estate of his late father; and, further, that the Defendants had failed to prove their plea of payment; and it condemned the Defendants jointly and severally to pay the sums claimed with interest.

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Bench, against which this Appeal has been preferred.

Their Lordships entirely concur with the two Canadian Courts in thinking that there was no evidence to support the plea for payment. If the Appeal is to succeed, it must do so on the defence raised by either the first or the second plea. The question on the first plea is, whether the claim of the Plaintiff can, by the law of Canada, be the subject of compensation. The Plaintiff's share in the revenue of the testator's residuary estate is beyond all doubt an alimentary allowance; and the authorities cited by Mr. Justice Badgley, and the 1,190th Article of the Civil Code, establish that a debt arising in respect of an alimentary allowance, is generally incapable of being the subject of compensation. That such a plea would be bad if the question had arisen between the trustees and one of the children indebted to the estate who was not a trustee, is, their Lordships apprehend, too clear for argument. It is, however, contended that the fiduciary character of the Plaintiff, and the duties imposed upon him by the will, take this case out of the particular rule. Sir Richard Baggallay relied, first, on the direction in the will that the trustees should reduce the residue into possession without delay. He did not go so far as to say that this clause made the realization of the whole residue a condition precedent to the distribution of the annual income of the residue. But he insisted that, it expressly imposed upon the Plaintiff, as trustee, the duty of bringing the debt which he owed into the common fund, and that his failure to do this suspended his right to receive his share of the fund.

Another argument was founded on the English doctrine, that a debt due from an executor is assets in his hands. This doctrine, however, if it obtains in Lower Canada, where the functions and powers of an executor are by no means the same as those of an English executor, seems to their Lordships to have little application to the present case, in which, *ex concessis*, the debt continues to be outstanding, the larger portion of it being the subject of a special contract between the debtor and his co-trustees. In truth the argument for the Appellants on this part of the case seems to resolve itself into this: that the Plaintiff being a trustee and executor, his

claim has lost the immunity from compensation which by the general law it would possess, by reason of the rule (assumed to exist in Lower Canada as in England) that a trustee or executor cannot take anything out of the estate whilst he continues to be indebted to it. But for this exception to the general rule of the law of Lower Canada, no authority has been adduced. That law does not recognize the distinction between law and equity which obtains here. It has now been reduced to a code. The articles of the code expressly state: first, that when two persons are mutually debtor and creditor of each other, both debts are as a general rule extinguished by compensation; and, secondly, that compensation does not take place in the case of a debt which has for object an alimentary provision not liable to seizure.. The Defendants by their plea invoke the first Article, which is wide enough to embrace every case of set off, whether legal or equitable. And their Lordships cannot see that, by any other Article of this code, or otherwise, the Courts in Canada have power upon some supposed ground of equity to engraft an exception upon the exception established by the second Article.

It is suggested in the Appellant's factum filed in the Court of Queen's Bench, that the Respondent, being a Trustee, might, if his argument be well founded, continue to receive his alimentary allowance, although he had misappropriated to a large extent the trust fund. It is not necessary to consider what would happen in such a case. It is sufficient to say that the debt by which it is now sought to compensate the alimentary provision, does not arise out of the misappropriation of trust moneys; but out of transactions with the testator in his lifetime.

Again, it is stated in the first plea that the presumable intention of the testator was only to exempt the alimentary provision made to his children, from transfer and assignment to strangers, and not to free it from any charge or lien which the executors might have on it for indebtedness to the estate. And arguments founded on this presumed intention have been used both in the Court of Queens Bench and here at the bar. Their Lordships, however, concur with the learned Judges of the Court of Queen's Bench in thinking that no

grounds for imputing to the testator an intention to vary the general law as to alimentary provisions are to be found in his will. The scheme of his will is this: By the exercise of the testamentary power he suspended the vesting of the shares of his heirs in the corpus of his estate, or made them capable of being divested; and so far deprived his children of that which the law would have given them if he had died intestate. As a compensation for this he gave them, until the period of final division should arrive, this alimentary provision, with the benefit of that protection which the law of Canada throws over such provisions. There are no words from which it can be inferred that he intended to diminish that protection. The fact that the Respondent and others of his sons were indebted to him, or generally embarrassed when he made his will, or afterwards became so, tends in their Lordships' opinion rather to raise than to rebut the presumption that he meant this alimentary provision to be free from all claim to compensation; and to insure to them the means of support whilst they were kept out of their inheritance.

Their Lordships have next to consider the defence made by the second plea, which is founded on the right to "rapport" or "return." The slightest reference either to the Canadian Code, chap. v, sect. 1, or to the corresponding chapter in the Code Napoléon, livre III, chap. vi, sect. 1, is sufficient to show that this right is simply an incident to a partition; that it is one which may be claimed by the co-heirs (in France, natural; in Canada, either natural or testamentary) against an heir who is either indebted to the estate, or has received certain advantages out of the succession from the ancestor in his lifetime by gift *inter vivos* or otherwise. So far as it applies to a debt due to the estate, it is only compensation in particular circumstances, and in a particular form. And, accordingly, it is not easy to see wherein the second plea substantially differs from the first.

In the argument at the bar it was almost conceded that this plea could not be supported, in so far as it insists on the application of the principle of "rapport" until the whole debt, principal and interest, was satisfied. But it was argued that the

claim of the Respondent was in the nature of an action for "partage" of the income; and, consequently, that he was bound to bring in, by way of "rapport," at least the interest of the debt.

This argument seems to their Lordships to proceed on a false view of the relations between the parties. The question does not arise upon a partition, properly so called, even of income, between the testator's co-heirs, but upon the execution, by his trustees, of a particular trust in his will; and, therefore, neither as to principal nor as to interest does there seem to their Lordships to be any solid foundation for the trustees' present claim to a "return;" a claim which is only an indirect mode of obtaining that compensation which the law will not allow them to have directly or *eo nomine*.

Their Lordships are, therefore, of opinion that the judgment of the Court of Queen's Bench was right as to all the defences raised in the action.

There remains, however, to be considered a question of minor importance, which, though raised in the Appellant's factum does not appear to have been noticed by the learned Judges of the Court of Queen's Bench. It is, that the judgment of the Superior Court is, at all events, excessive, in that it has given to the Respondent the instalments of his alimentary provision, as calculated upon the assumption that the interest due upon his debt entered into the general income of the residue. The result would be that, though he has not paid that interest, he will receive one-tenth of it in the instalments claimed, and be overpaid by about 27 dollars. This point has now been discussed at the Bar, and it has been agreed that the sum for which judgment has been entered ought to be reduced by this amount and any interest that has been calculated upon it.

Their Lordships need hardly point out that the judgment under appeal will in no way prevent the Respondent's co-trustees from enforcing, in another suit, the claims of the estate against any other property which he may possess, if any such there be, or his co-sharers in the estate, from insisting on the right of "rapport," on the final partition of the corpus. But, for the reasons above given, their Lordships must humbly recommend Her Majesty to

affirm the judgment of the Court of Queen's Bench, subject to the reduction above stated. Their Lordships do not think that this slight variation in that judgment ought to occasion any departure from the general rule as to costs. And the Respondent will accordingly have the costs of this appeal.

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