

Privy Council Appeal No. 62 of 1918.

Joseph Edouard Auger and others - - - - - *Appellants*

v.

Dame Corinne H. Beaudry and others - - - - - *Respondents.*

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 5TH AUGUST, 1919.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD PARMOOR.

MR. JUSTICE DUFF.

[*Delivered by* LORD BUCKMASTER.]

The resolution of this dispute depends upon the true construction to be placed on the Will of Jean Louis Beaudry, who died on the 25th June, 1886. He left surviving five children, born in lawful wedlock, four daughters, viz., Corinne Herminie, who married, and is known as Mrs. R. Roy, Léocadie Clorinthe (*alias* Clorinde) Beaudry, who married Mr. Joseph Cyrille Auger, Victorine Beaudry, who married Mr. Lionel Gardiner, Malvina Beaudry, who married Mr. Edmond Starnes, and one son—Guillaume Napoléon Léonidas Beaudry. Guillaume Napoléon died without issue in 1887. Mrs. Auger died in 1894, leaving ten children, and Mrs. Gardiner died in 1915 without issue.

The question that arises in this case is as to the disposition of the share which Mrs. Gardiner took, both original and accrued in the testator's property.

The Will in question was dated the 29th December, 1881.

It was divided into eighteen articles or paragraphs. By Articles 4, 5, 6, and 7, the testator made certain specific gifts in favour of all his five children, other than Mrs. Starnes, whose interest in the estate was by Article 8 defined and limited by the grant of an annuity, and whose name need not be considered further in connection with these proceedings. The other gifts were of specific properties, given in favour of his children and grandchildren. In each case the property was bequeathed in the same terms, and taking the case of Article 4, which contained the gift to Mrs. Roy they were as follows :—“ Je donne et lègue à Dame Corinne Herminie Beaudry épouse de Rouer Roy, la jouissance et usufruit, sa vie durant ”—and then follows a full description of the property and the clause concludes by providing that the legatee is to enjoy the property “ à titre de constitut et précaire, sa vie durant, et pour, après son décès, appartenir la pleine propriété de ces terrains et dépendances aux enfants nés et à naître d'elle en légitime mariage par souches.”

Article 18 of the Will was divided into clauses ; by clause 9 the testator conferred a power of appointment on each child in favour of their issue, and by clause 6 he provided what should happen in the event of the death of any of these four children without leaving children or living descendants. Upon this clause the whole dispute really depends ; it is in the following words :—

“ Qu'au cas de décès d'aucun des dits Corinne Herminie Beaudry, Guillaume Napoléon Léonidas Beaudry, Léocadie Clorinthe alias Clorinde Beaudry et Victorine Beaudry sans laisser d'enfants ou descendants vivants, sa part dans mes biens retourne aux survivants de mes quatre enfants, légitimes ci-dessus en dernier lieu nommés pour, par eux en jouir, à titre de constitut et précaire ou en jouissance, leur vie durant, et pour la propriété d'icelle part, appartenir à leurs enfants nés et à naître en légitime mariage et par souches.”

In its general form the question that arises is whether this gift over, upon the death of any one of the named children without issue, is a gift which includes in its provisions the children of a child who at the date of such death were surviving, although their parent was dead. Associated with this, there were two subsidiary points, the one which drew a distinction between that part of Mrs. Gardiner's estate which was due to her having shared with her sisters in the property left to her brother, and the other as to what was the true nature of Mrs. Roy's interest in the accrued share, and whether, in the event of her dying without issue she would have power to dispose of it by will.

The case was originally heard before Mr. Justice Monet, who declared that Mrs. Roy was “ unique propriétaire ” of the whole of the share she took by reason of Mrs. Gardiner's death without issue, and that this included a share both in Mrs. Gardiner's original estate and in the share she took on her brother's death. On appeal this judgment was modified. Mrs. Roy was, as to Mrs. Gardiner's original share, declared entitled as

“ Unique propriétaire à titre de constitut et précaire ou en jouissance sa vie durant à charge de substitution en faveur de ses enfants en vertu de la clause 6 de l'article 18 du dit testament.

and as to the property which Mrs. Gardiner had taken from Guillaume Napoléon it was declared to form part of Mrs. Gardiner's estate.

From this judgment the appellants, the children of Mrs. Auger, have brought the present appeal. So far as it relates to the share taken by Mrs. Gardiner in the property given to Guillaume Napoléon, it is impossible as this appeal is constituted to determine the matter, for the legal personal representatives of Mrs. Gardiner have not been made parties. Upon this, therefore, Their Lordships will pronounce no opinion, but to avoid the expense of further proceedings, and to safeguard the appellant's rights of appeal they will advise that this part of the appeal stand over in order that the appellants may have time to determine whether they think it desirable to add the necessary parties; if they so desire, and take the necessary steps within six months, their Lordships will then further consider that point which for the present will remain undecided. For the rest, the real question is as to the meaning of the substituted gift. There is no doubt much force in the appellants' contention that no reason whatever can be assigned for excluding from the benefit of the gift the children of a deceased child of the testator. The truth is that in the preparation of such gifts the draftsman is liable to fix his mind simply upon the death of the first of the children to die, in which case the gift over works without difficulty, and he does not concentrate his attention upon what will happen in the event of the death of a child without issue, who has been predeceased by another child leaving issue behind. The gift over therefore, only too often does not carry out what if speculation were permitted, it would be reasonably certain that the testator wished, and it is these considerations that have sometimes led the Courts to attempt so to read the words as to make the Will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if there are other words to help the meaning, it is one which no doubt the Courts would readily adopt. But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognised that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the Will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean.

Turning then to the words, we find that the clause provides for the death of any of the four children, each named in turn, without leaving children or living descendants, and in that case the share in the goods is given to the survivors of "*de mes quatre enfants légitimes ci-dessus en dernier lieu nommés,*" to "enjoy the usufruct during their lives." and for the property of that part to belong to their children born, and to be born by stocks. Now, the survivors of the four named children can only be the

survivors of the testator's own children, and it is only the property of that part which such survivors enjoy that is to belong to their children after their death. If, therefore, one of the children had died, leaving issue before a case occurred which brought the clause into operation, such child would not be one of the survivors to enjoy during life, and there would be no part of the property which could belong to his or her children after death.

This is in their Lordships' view, the plain and unmistakable meaning of the words, and it only remains to be considered whether there is an artificial rule of construction provided either by the French Code, or by similar cases in the English Courts which would justify another view of their effect.

So far as the French Code is concerned the argument depends on article 980, which is as follows:—

“ Dans la prohibition d'aliéner, comme dans la substitution, et dans les donations et les legs en général, le terme enfants ou petits enfants, employé seul soit dans la disposition soit dans la condition, s'applique à tous les descendants avec ou sans gradualité suivant la nature de l'acte.

But in the present case there is a strong qualification of the word “enfants,” namely, the words which relate it in terms to the named children, and remembering how carefully the children and the grand-children are separately dealt with, it is in their Lordships' opinion impossible to say that the word is intended to mean the families of the children when the gift that follows is a gift for life, wholly inapplicable if the word included descendants.

Certain English cases are then quoted for the purpose of supporting the view that under similar words in an English Will, the Courts would hold that a survivorship might take place by the survivorship of the family, or as it is sometimes called, by stirpital survivorship. The case most nearly applicable is the case of *Hawkins v. Hamerton* (16 Simons Reports, page 410). In that case the testator gave the residue of his estate in trust for his son and three daughters or such of them as should be living at the death of his wife equally during their lives and after their death equally amongst all their children, and he provided that in case any of his said sons and daughters should die without leaving issue that the share of him, her, or them so dying should be divided amongst the survivor or survivors of his said children, and their issue in the like equal parts, shares, and proportions. The learned Judge said that it appeared plain that the testator by the words “survivor or survivors of my said children” did not mean such of his children as should survive his widow; and he added “my opinion is that though he has used the words ‘survivor or survivors,’ he meant others or other, and as he has added the words ‘in like equal parts, shares, and proportions,’ I think he meant the issue of deceased parents to take *per stirpes*.”

It is important to observe the concluding words of this statement, for in truth it is upon them that the decision rested, and it was because the testator had added the final phrase that the

learned Judge was able to place the construction he did upon the earlier words. It is unnecessary to pursue the English authorities further upon this case, though reference may profitably be made both to the statements of Lord Macnaghten in *King v. Frost*, L.R. 15 A.C., 548, at p. 552, and to those of Cozens Hardy, M.R., in *Harrison v. Harrison*, L.R., 1901, 2 Ch., p. 136, at pp. 141 and 143. The words which have enabled the Courts to give a benevolent construction to a gift over such as those used in *Hawkins v. Hamerton*, or in the case of *Waite and Littlewood* (8 Ch. Apps. 70) are not to be found in the present case. The gift here is a distinct gift to the survivors, and it is the share that is taken by such survivor that after his or her death is to go to his or her children. A child who does not survive can take no share, and there is consequently nothing that his or her children can take when he or she is dead. Their Lordships note with satisfaction that this opinion is not only in agreement with the judgment from which this appeal is brought but also with the decision in a case of some resemblance to the present—*Marie v. Bourassa*, 18 R.L., 454. As to whether such share is taken so that on the failure of all Mrs. Roy's descendants at her death she can dispose of it, is a question which does not now, and never may arise. Their Lordships do not think that the Court of Appeal decided that it should be now determined, nor do they regard their judgment as having that effect. In their opinion it is only necessary to say that Mrs. Roy is entitled as life usufructuary to the original share which was enjoyed by Mrs. Gardiner, with substitution in favour of her children in accordance with Cl. 6 of Art. 18, and this is the actual judgment of the Court of King's Bench. They reserve the final advice that they are tendering to His Majesty upon this appeal until after the appellants have decided what steps, if any, they propose to take with regard to the question which is left open.

In the Privy Council.

JOSEPH EDOUARD AUGER AND OTHERS.

v.

DAME CORINNE H. BEAUDRY AND OTHERS.

DELIVERED BY LORD BUCKMASTER.