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June 4, 5, 28*

WILLIAM DARLING AND OTHERS.....APPELLANTS;

AND

ROBERT BROWN AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA—(APPEAL SIDE.)

Executors, liability of—Débat de compte—Interest—Prescription.

Respondents, representing one of the universal residuary legatees of one *W. D. Sen.*, sued Appellants as joint testamentary executors of the said *W. D. Sen.*, to render an account and pay over the balance of the estate in their hands.

On a *débat de compte* the total value of the estate was proved to be worth $44,525.65. Of this amount Appellants in their said capacity, as appeared by an account rendered by them, took possession of $14,510.33. The balance of $30,015.33 appeared by the books of *W. D. & Co.* to be due to the estate of *W. D. Sen.*, by *W. D. Jun.*, one of the executors, and to have never come into the possession of the other executors.

Held,—That under Art. 913, *Civil Code L. C.*, Appellants were jointly and severally responsible only for the amount they took possession of in their joint capacity, and, therefore, that *W. D. Jun.* alone was responsible for the amount of such balance. [*Taschereau*, J. dissenting].

2. That testamentary executors cannot legally be charged with more than *six per cent.* interest on the moneys collected by them, after their account has been demanded, in the absence of proof that they realized a greater rate of interest by the use of such moneys.

3. That entries in merchants books, regularly kept and unchanged during a term of years, with an annual rendering of accounts conforming to such entries to creditors, make proof against such merchants, particularly after the death of the creditors.

4. That an action against executors for an account of their administration, and of the moneys they have received, or ought to have received in their said capacity, cannot be prescribed otherwise than by the long prescription of 30 years.

*PRESENT—Richards, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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THE Judgment appealed from was rendered by the Court of Queen's Bench of the Province of *Quebec*, (Appeal side) on the 18th of December, 1876, and confirmed the Judgment rendered by the Superior Court at *Montreal* (*Mackay*, J.) on the 22nd day of January, 1876.

The Plaintiffs, as the executors of the will of the late *George Templeton*, sued the Defendants, executors of the late *William Darling*, for an account, and for $6,360.80, the amount of the share (one-seventh) in the succession of the late *William Darling* that belonged to the late *Isabella Darling*, *Mrs. Templeton*. She died in 1871, leaving her share to her husband. He died in 1875, leaving all to the Plaintiffs in trust.

William, *Thomas* and *Henry Darling* produced an account, and by this account the value of the estate was reduced from $44,525.65 to about $2,017.18.

The Plaintiffs thereupon contested the account produced and filed in the case, and by their *débat de compte* they alleged that, "the Defendants wholly neglected to make any legal inventory of the estate and succession of the said testator, *William Darling*, and suffered the Defendants *William Darling* and *Thomas Darling* alone to manage and administer such estate, and to take possession of all the property of said estate, and of all books and papers connected therewith, and especially of all the said accounts current rendered yearly by *Wm. Darling & Co.*, since the year 1862, and did, to all intents and purposes, constitute the said Defendants, *William Darling* and *Thomas Darling*, their agents and attorneys, with respect to all matters connected with said estate and succession, and the management and administration thereof, by reason whereof they, the said Defendants, became, and were, and are jointly and severally, responsible and liable to the said

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several universal legatees of the said testator, *William Darling*, in the Plaintiff's declaration in this cause fyled mentioned, and to the said Plaintiffs, in their aforesaid capacity, for their several and respective shares in the aforesaid estate and succession."

That *Wm. Darling & Co.* rendered yearly accounts to the late *William Darling Sen.*, during seventeen years before his death, by all of which they admitted to owe him, as the Plaintiffs claim, the statement for the term of the last year of the life of the testator showing $44,525.64 due to his estate.

There was an answer to the *débat de compte*, and a demurrer to the conclusions in the said *débat de compte* for, among others, the following reasons :—

First,—Because said allegations refer exclusively to questions between the Defendant *William Darling* and the firm of *Wm. Darling & Co.*, therein mentioned as composed of the Defendants, *William Darling* and *Thomas Darling* and the late *William Darling Sen.*, and as to whether said *William Darling* and *Wm. Darling & Co.*, were or were not the debtors of the late *William Darling Sen.*, and not whether the Defendants, as executors, were accountable in the premises ;

Second,—Because it is not shown by said allegations, or either of them, that the Defendants, as executors, recovered, or became possessed of, or accountable for anything whatever which may have been in the hands of the said *William Darling* or *Wm. Darling & Co.*, due to the said late *William Darling Sen.*

Third,—Because it is not shown that either the said *William Darling* or *Wm. Darling & Co.* owed any debt to the said late *William Darling Sen.*, which they, or either of them, had acknowledged to owe, or had undertaken to pay within the time allowed by

law for the recovery of the like indebtedness; or that the Defendants were bound and liable to have proceeded at law for the recovery of such indebtedness, and had failed in their duty in that behalf.

Besides the general issue Appellants pleaded that the ultimate result of the transactions between *William Darling Sen* and *William Darling Jun.*, made *William Darling Sen.* not a creditor but a debtor.

That if *William Darling Jun.* had been a debtor, which was denied, he never paid nor would pay the executors, and they never did nor could recover anything from him. Besides, being a commercial matter, the claim was barred and prescribed by the lapse of more than five years, and also more than six years before action brought.

They also denied the alleged agency for the other executors, and denied any negligence as to inventory, which they say was made in the only manner *George Templeton* or his wife would permit.

The case came up for trial before His Honor Mr. Justice *Mackay* on the 3rd December, 1875, and on the 22nd February, 1876, the Superior Court rendered judgment in favor of Respondents, maintaining the *débat de compte* fyled by the Respondents, and condemning the Appellants, jointly and severally, to pay to the Respondents the sum of $6,360.80 currency, besides interest at seven per cent. This judgment was confirmed by the Court of Queen's Bench of the Province of *Quebec* (appeal side).

On this appeal the principal questions to be determined were:

1st. Whether, at the time of the institution of this action, the Appellant, *William Darling* individually, or as having carried on business under the firm of *Wm. Darling & Co.*, or as successor to the firm of

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Wm. Darling & Co., composed of said Appellants, *William Darling*, and *Thomas Davidson*, owed the estate of the said late *William Darling Sen.* any, and if any, what sum.

2nd. Whether the Appellants were liable in the present action to account for more than they had actually recovered and got into their possession.

3rd. Whether the Respondents were entitled to raise the question of the indebtedness of the said firms of *Wm. Darling & Co.*, or of either of them, or of the Appellant *William Darling*, or of the Appellants *William Darling* and *Thomas Darling*, to the said late *William Darling Sen.*

4th. Whether, if liable, the Appellants should have been condemned jointly and severally, and whether *Adam Darling* should not have been included in the judgment, or each condemned only for what he received, or for his share of what came into their united possession.

5th. Whether any, and if any, what part of the amount claimed by said *débat de compte* was barred and prescribed, either by the prescription of five years or by that of six years.

6th. Whether the judgment against the executors for seven per cent. interest from the date of the decease of *William Darling Sen.* is well founded and can be sustained.

From the evidence it appears that *Adam Darling*, one of the Plaintiffs, wrote a letter to the Respondents on the 11th August, 1871, asking them to render an account. It was only on the 1st day of May, 1875, that the Appellants, after being sued, rendered their account, and by that account they admit their joint indebtedness as executors to the estate of *William Darling Sen.* in a sum of $15,938.01. On a *débat de compte*, it was

proved by the books of *Wm. Darling & Co.*, that *William Darling Jun.* was indebted to the estate of his father in a further sum of $30,015.33. This indebtedness arose in the following manner: In 1853 *William Darling Jun.*, purchased for £4,000 the stock in trade of *David Darling*, and having valued the goods, he placed the value over and above what he paid for them, viz.: £2,837 1s. 11d. to his father's credit, he being interested in the estate of *David Darling*, representing *D. & C. Darling*. From that time until after the death of *William Darling Sen.* in 1871, *William Darling Jun.* continued this credit, paid interest on it, and rendered an annual statement to *William Darling Sen.*

It was also proved that $6,360.80, the amount claimed by Respondents, was paid to other legatees by *William Darling Jun.* as their share in the estate (one seventh).

Mr. *Cross*, Q.C., for Appellants:—

Executors are not, in the Province of *Quebec*, as under other systems, representatives of the deceased generally. They have only such special powers as are given them by the law, or by the testament; they are like mere attorneys, with the powers, and the special powers only, conferred on them and no other.

Furgole, Traité des Testaments (1); *Toullier* (2); *Nouveau Furgole* (3).

Testamentary executors *for the purpose of the execution of the will, are seized as legal depostiaries.* When his duties are at an end, the testamentary executor must render an account to the heir or legatee who receives the succession, *and pay him over the balance remaining in his hands.—Civil Code, L.C.*, Art. 918. He pays the debts and discharges the particular legacies, with the consent of the heir or of the legatee who

(1) T. 4, Cap. 10, sec. 4, Nos. 12 & 16. (2) T. 5, Nos. 577 & 578.
(3) T. 2, p. 469.

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receives the succession ; or, after calling in such heir or legatee, with the authorization of the Court. In the case of insufficiency of monies for the execution of the will, he may, with the same consent or with the same authorization, sell movable property of the succession to the amount required. The heir or legatee may, however, prevent such sale by tendering the amount required for the execution of the will. The testamentary executor may receive the debts due, and may sue for their recovery.—*Civil Code, L. C.*, Art 919.

His seizin is not a true possession, but a mere detention for the heir or universal legatee, who can cause it to cease at any time, by furnishing the necessary funds to pay the particular legacies. *Demolombe* (1) ; *Bourjon* (2) ; *Coutume de Paris* (3) ; *Toullier* (4) ; *Civil Code, L. C.* (5).

Before the Superior Court the question tried was whether *Wm. Darling & Co* were debtors of *William Darling Sen.* Now, if *William Darling Jun.* is indebted to the estate, and if he be at the same time an executor, he is liable, the proper course to recover would be on an issue raised with *William Darling Jun.* alone.

[HENRY, J. : Why did he pay three legatees and refuse to pay Respondents ?]

Any money paid to the other universal legatees proceeded from *William Darling Jun.*, who had a right to pay it, without involving the executors in a liability.

No executors account was at any time made, save the one produced in this cause. There was no obligation on their part to collect debts. All they were required to do was to pay debts.

(1) Don. t. 5, No. 57.

(2) T. 2, Partie 5, Ed'n. 1747, C. 11, sec. 2, Nos. 14, 15, 19 & 20.

(3) Art. 297.

(4) T. 5, Nos. 581, 582 & 585.

(5) Art. 919, 1027.

See *Furgole* (1); *Sirey*, Recueil Gen. (2); *Coutume de Paris par Ferriere* (3); *Bourjon* (4); *Nouv. Deniz* (5); *Toullier* (6); *Ricard*, Don. (7).

The claim passed to the universal legatees, in whom it became vested in undivided shares; there is nothing to prevent the representatives of *Isabella Darling* from suing the universal legatees for her share of this debt.

Legatees are, by the death of the testator or by the event which gives effect to the legacy, seized of the right to the thing bequeathed, in the condition in which it then is, together with all its necessary dependencies, and the right to obtain payment, and to prosecute all claims resulting from the legacy, without being obliged to obtain legal delivery.—*Civil Code, L. C.*, Art. 891.

Now, as a matter of accounts between *William Darling Sen.*, and the different firms of *Wm. Darling & Co.* the only firm whose accounts shewed a balance in favour of *William Darling Sen.* was that in which *William Darling Jun.* was the sole partner, terminating 31st December, 1864, at which time the true balance was $1,660.94.

This being a commercial account, all remedy against *William Darling Jun.* for its recovery is prescribed before the acceptance of the executors.

Moreover, the judgment complained of condemns, jointly and severally, the executors who defended themselves, and rendered an account; and exonerates the executor *Adam Darling*, who allowed the case to

(1) T. 4, c. 10, sec. 4, Nos. 34 & 36.

(2) T. 2, *Verbo* Ex. Test., No. 37.

(3) T. 4, p. 284.

(4) Test. T. 2, C. 11, sec. 4, Nos. 34 & 35, p. 378.

(5) *Verbo* Ex. Test., p. 217 No. 6, p. 227 No. 12, p. 228 No. 16, and p. 230 No. 8.

(6) T. 5, No. 591

(7) T. 1; Partie 2me., C 2, p. 409, Nos. 84 & 81, and p. 410, No. 84.

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go by default, and rendered no accounts, although he admits, in his evidence, that he joined in the administration, and strains his statements to make them as prejudicial as possible to the executors.

Henry William lived at *Toronto*, and actually took no part in the administration; he is condemned, jointly and severally, with the other Appellants. As one who acted and was present is not condemned, this cannot be according to law or justice, and should be reformed in accordance with the distinct language of the *Code*.

On this point reference was made to the following authorities:—

Bourjon (1); *Repertoire de Merlin* (2); Art. 913 and 2230 *Civil Code, L. C.*, and Art. 1033 of *Code Nap.*

There remains for discussion the question of interest. Appellants are condemned to pay $6,360.30, with interest at 7 per cent. from the 19th January, 1871. It is difficult to conceive how executors can, in any case, render themselves liable for interest at the rate of 7 per cent.; if it be on the convention, or course of dealing of *Wm. Darling & Co.*, it clearly shows that it is still an affair between *Wm. Darling & Co.* and the estate; that the amount has not come into the hands of the executors, but is in the hands of *Wm. Darling & Co.*; and that the condemnation in this case, is that of *Wm. Darling & Co.* through the executors, or of the executors in the place of *Wm. Darling & Co.*. Executors are only liable in case of default for interest at the legal rate, and it does not accrue until judicial demand or formal default made (3). It is not their right even to make a convention for more, and there is no question of that here.

Mr. *Edward Martin*, Q. C., for Appellants, followed: There is also evidence in support of Appellant's con-

(1) T. 2, Part. 5, C. 11, sec. 4, No. 39. (2) *Vo.* Ex. Test. T. 4, sec. 9, p. 817.
(3) *Civil Code L. C.*, Art. 871.

tention that there were errors in the accounts of *William Darling Sen.*, and the various firms of *Wm. Darling & Co.* of *Montreal*. *William Darling Jun.* never got any value for an item of £2,837 1s. 11d ; but estimating that he would be able to make a profit to that extent out of the stock in trade of the insolvent estate of *D. & C. Darling*, which he had purchased from *David Darling*, and his father being at the time insolvent and in distressed circumstances, this credit was meant as a provision for him in the meantime, subject, as he, *William Darling Jun.* considered, to his own control, and conditional always on a profit being made out of the goods, for which he paid full value ; viz., 13s. 4d. in the £ on the original cost and charges ; the difference between his purchase and the original cost and charges formed the basis of the estimated profit that might be obtained.

Mr. *Strachan Bethune*, Q.C., for Respondents :

The only points which need be discussed before this Court are, whether Respondents were entitled to 7 per cent. interest ; whether the executors ought to be jointly severally condemned ; and whether the debt was prescribed.

There can be no doubt that the executors, by the will, were directed to pay to each of *William Darling Sen.'s* universal legatees and devisees their respective shares in the estate. But as Appellants suffered *William Darling Jun.* and *Thomas Darling* alone to manage and administer the estate, and did, to all intents and purposes, constitute them their agents and attorneys, Respondents, I contend, are entitled to recover against Appellants, jointly and severally, the amount which has been provedby the books of *Wm. Darling & Co.* and by the yearly accountings, statements and acts of *Wm. Darling & Co.* to be in their possession, as forming part of the estate of the

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testator. *Pothier* on Obligations (1); *Dantil* de la Preuve (2); *Dixon* on Evidence (3).

As to *Adam Darling* (also a Defendant in the cause), all I have to say is, there is no issue between Respondents and him; the litigation which is now before the Court is upon a *débat de compte* with which *Adam Darling* had nothing to do.

Respondents are entitled to the same amount and to the same interest as the other legatees, *H. W. Darling*, *Mrs. Grace Lyell*, *Adam Darling*, *Thomas Darling*, and *William*. These legatees have each received from *William Darling Jun.* the sum now claimed by Respondents with interest at seven per cent.

There can be no question as to what prescription should effect this debt. The Court below was unanimous that the only prescription applicable is that of 30 years. Supposing even the debt were of a commercial nature, there is no clearer principle of law than that yearly payments of interest (as were made in this case) would interrupt the prescription: *Dunod* de la Prescription (4).

The only point on which there can be any doubt is whether *Henry William* and *Thomas Darling* should be condemned, as well as *William Darling Jun.* Respondents based their claim on the fact that these two left the moneys in the hands of *William Darling Jun.* and are therefore responsible for his indebtedness. However, Respondent would be satisfied with a judgment condemning *William Darling Jun.* alone.

Mr. *Cross*, Q. C., in reply.

TASCHEREAU, J.:—

This is an appeal by *William Darling*, *Thomas Dar-*

(1) No. 757.
(2) P. 551. Nos. 26, 27.
(3) Sec. 1183.
(4) Nos. 171, 172.

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ling and *Henry Darling*, under their qualities as executors of the last will and testament of the late *William Darling Sen.*, from a judgment condemning them jointly and severally to pay to the Respondents, in their qualities of executors and trustees under the last will and testament and codicils of the late *George Templeton*, the sum of $6,360.80, balance of their gestion and administration, as being the share of said *George Templeton* as representative of his late wife *Isabella Darling*, who was one of the seven universal legatees of the late *William Darling Sen.* The Appellants rendered an account, which was contested by the Respondents, who succeeded in the Superior Court, and in the Court of Queen's Bench, at *Montreal*, the condemnation being for $6,360.80, with interest at 7 per cent. from 19th January, 1871. The principal difficulty in the case was as to the debt of $30,015.83, which, on the first day of January, 1871, appeared to have been due by the firm of *Wm. Darling & Co.* to the said late *William Darling Sen.*, and which was in the hands of the said *William Darling Jun.* He, *William Darling Jun.*, denied the debt and pleaded prescription of five and six years against the same. It was satisfactorily proved that all accounts between the late *William Darling Sen.* and *Wm. Darling & Co.* were settled yearly for seventeen years up to the 1st January, 1871, and that there was a balance of account at this last date, of $30,028.85, with the interest thereon, in favour of *William Darling Sen.* But it is contended by the Appellants, that though this balance appears in the books of *Wm. Darling & Co.* still this was not sufficient acknowledgment of the debt, inasmuch as this entry was not signed by the parties thereto, and besides that this debt was prescribed by five and six years. I differ from these pretentions of the Appellants, for it is admitted that entries in a trader's books made regularly are a complete proof against

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him, unless an error has been proved; no such error has been proved, and I say that it would be a singular circumstance if, after 17 years continuous acknowledgment, an error had been discovered for the first time by the debtor, and the amount appearing to be due only repudiated after the death of the creditor. Moreover, the fact that the Appellants have settled with the other legatees of *William Darling Sen.* on the same basis affords a very strong presumption in favour of the legitimate existence of the debt.

The Appellants, I have said, contend also that this claim is prescribed by either five or six years. This prescription cannot apply, as the transaction was not of a commercial nature, the loan by a non-trader to a trader not being a commercial transaction and not subject to the limitation of six years, as decided in the case of *Whishaw* v. *Gilmour* (1). The following authorities also favour of this decision; viz., *Pardessus* (2); *Goujet et Merger* (3), and many others. Even admitting for the sake of argument that the claim in question could be regarded as one of a commercial nature, chap. 67 of the *Consolidated Statutes of Lower Canada*, on which the Appellants rely to maintain their six years' prescription, does not apply, inasmuch as the entries in the books of *Wm. Darling & Co.* up to the 30th September, 1871, take the case out of the statute of limitations. The prescription of five years being a new prescription introduced by the *Civil Code* cannot be invoked, as under article 2,270 of the same *Code* prescriptions begun before the promulgation of that *Code* must be governed by the former law. Moreover, the Appellants, since the opening of the succession in January, 1871, came into possession of the moneys, not as contracting parties,

(1) 15 L. C. R. 177. (2) Droit Commercial T. 1, pp. 5 to 89.
(3) 1 Dict de Drt. Com., *Vo.* Acte de Commerce, p. 24, 25.

but as trustees or executors, and in such quality they could not prescribe the claim by such short prescription. Their relations with the estate of *William Darling Jun.* were not of a commercial nature, and, therefore, the only prescription which could apply would be that of thirty years, which this case has not yet reached.

The most serious objection of the Appellants is that they were jointly and severally condemned to pay the sum in question—that there is error so far as to a joint and several condemnation. The matter is regulated by article 913 of the *Civil Code L. C.*, which is in these words:

> Executors exercising joint powers are jointly and severally bound to render one and the same account, unless the testator has divided their functions and each of them has kept within the scope assigned to him. They are responsible only each for his share for the property of which they took possession in their joint capacity, and for the payment of the balance due, saving the distinct liability of such as are authorized to act separately.

There may be some ambiguity in that article but it seems to us that though the article 913 of the *Civil Code* obliges the executors to render jointly and severally an account of their gestion and administration, it does not condemn them to pay the balance jointly and severally, but merely make each of them responsible for his share of the property of which they have taken possession in their joint quality. This is in conformity also with article 1105 of the same *Code*, which says that in purely civil cases an obligation is not presumed to be joint and several, it requires express terms to make it such, but in commercial cases the joint and several liability is presumed.

We are all of opinion that there is error:

1. In the part of the judgment appealed from condemning the Defendants jointly and severally.

2. In relation to the rate of interest at 7 per cent

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We do not see our way clearly enough to say that the executors have undertaken to pay the 7 per cent. It should be reduced to 6 per cent.

3. That the date from which the interest is allowed by the judgment to run, should be altered from the 19th January, 1871, to 11th August, 1871, when the executors were *mis en demeure* to render an account.

The judgment will therefore be confirmed, with costs, save and except the above modifications.

As to that part of the judgment now being about to be pronounced, which declares that the three Appellants, *William Darling*, *Thomas Darling* and *Henry William Darling* shall be condemned each in different sums of money, I must here enter my dissent. I think that this is against, not only the spirit, but the letter of the 913th article of the *Civil Code*, which says the executors are each responsible only for his share of the balance of the account, saving the distinct responsibility of those authorized to act separately (which is not the case in this instance.) For I say they took the whole estate under their common charge, allowed *William Darling Jun.* who was a debtor of the estate, to keep a large sum of money in his hands, and though they had, under article 919 of the *Civil Code*, the right to sue him for that sum, they allow him to keep it, and this contrary to that article. In this way they had a certain discretion to exercise, and if, with the view of favouring their brother *William* they did not force him to settle that part of the assets of the estate, which the law invests them with as executors, they become answerable for the consequences of a possible loss for their allowing their brother *William* to keep that sum; in fact, he became their joint depositary for that amount. It is with the view of avoiding a loss somewhere that the *Code* says that an executor will be answerable for his

share of the balance of account. With the distinction made by the judgment of this Court, should *William Darling Jun.* become insolvent, a great portion of the assets would be lost, inasmuch as the two others are only condemned to pay comparatively a very small sum. As I interpret the law, each executor, unless his duty is distinctly pointed out by the will, is bound to see that his co-executors do their duty, and though he may rely on them for the administration, he is still answerable for his share in common with the other executors. It would be, in my opinion, opening the way to fraud, and endangering the condition of children and heirs in general to allow the executors to claim an exemption of their joint liability for the balance due in their administration. I, therefore, differ from that part of the judgment to be rendered.

FOURNIER, J. :—

Poursuivis en reddition de compte comme exécuteurs du testament de feu *William Darling* leur père, les Appelants ont conjointement rendu compte de la somme de $15,938.01, reconnaissant ainsi l'avoir en leur possession ou du moins à leur disposition.

Les Intimés ont répondu à ce compte par des *débats* contestant l'item de $10,620.48 porté en dépenses, pour prétendus frais de commission, intérêts, etc., réclamés par *Wm. Darling et Cie.* contre la succession de leur père ; et alléguant que les Appelants sont en outre tenus comptables de la somme de $30,015.33 due à la dite succession par *William Darling Jun.* Ces *débats* se terminent par une conclusion demandant que les dits exécuteurs testamentaires soient conjointement et solidairement condamnés à payer la somme de $6,360.80, étant un septième de la somme de $44,525.54 qui doit

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être partagée entre les sept légataires de *William Darling Sen.*

Par la réponse aux *débats de compte* *William Darling Jun.* a nié devoir la somme de $30,015.33 à la succession de son père.

Ce plaidoyer était accompagné d'une défense en droit (*special demurrer*) par tous les Appelants, alléguant qu'il n'apparaissait pas par les *débats de compte* que les exécuteurs testamentaires ni aucun d'eux, n'eussent recouvré, ou ne fussent devenus en possession et comptables d'aucune somme qui pouvait être due par *William Darling Jun.* ou *Wm. Darling et Cie.* à la succession de feu *William Darling Sen.*; qu'il n'apparaissait pas non plus par les dits *débats* que, comme exécuteurs testamentaires, ils fussent obligés en loi de prendre des procédés pour le recouvrement de cette somme, ni qu'ils eussent manqué à leur devoir sous ce rapport.

Du consentement des parties, l'audition de cette défense en droit fut remise à l'audition finale au mérite.

Appréciant la preuve en cette cause de la même manière que l'ont fait les Juges en Cour de première instance et en Cour d'Appel, je suis comme eux et pour les mêmes motifs, arrivé à la conclusion que la valeur totale de la succession est de $44,525.64 dont un septième, savoir: $6,360.80 doit revenir à chacun des sept légataires de *William Darling Sen.* mais je ne concours pas dans cette partie du jugement prononçant contre les Appelants une condamnation solidaire pour ce montant avec intérêt à 7 p. cent. C'est à ces deux derniers points que je bornerai mes observations sur le jugement soumis à notre révision.

La question soulevée par le *demurrer* des Appelants sur la question de la responsabilité des exécuteurs testamentaires conjoints ne manque pas d'importance et n'est pas non plus sans difficulté. La Cour du Banc

de la Reine a admis le principe de la solidarité et les a condamnés en conséquence. Sur quoi s'est-elle fondée pour en arriver là ? Est-ce parce que les faits de la cause établissaient contre eux quelques actes de mal administration ou de négligence grossière, commis en leur qualité d'exécuteurs conjoints, et qui seraient de nature à entraîner la solidarité comme conséquence ? Ou bien encore, est-ce en invoquant l'Art. 913 du *Code Civil* que la Cour d'Appel s'est crue justifiable de déclarer que les Appelants étaient solidairement responsables du montant de la condamnation? Aucun de ces deux motifs ne me paraît suffisant. D'abord la solidarité ne peut résulter de leur mauvaise gestion, car il n'est ni prouvé ni allégué qu'il y a eu malversation, et même en semblable cas, chacun ne serait responsable que des conséquences de ses propres actes.

La solidarité entre exécuteurs testamentaires, il est vrai, peut exister, lorsqu'ils se sont constitués mandataires les uns des autres; mais dans ce cas elle ne résulte pas de leur qualité d'exécuteurs testamentaires, mais bien du contrat de mandat qu'ils ont fait entre eux relativement à leur administration, suivant l'Art. 1712 du *Code Civil* qui établit la solidarité entre mandataires. Comme il n'y a dans cette cause aucune preuve que les exécuteurs testamentaires ont agi comme procureurs les uns des autres, il n'y a par conséquent aucune raison de leur faire l'application de cet article.

Les exécuteurs testamentaires n'ayant point fait inventaire, on ne peut pas dire qu'ils se sont mis de cette manière en possession de toute la succession. Leur reddition de compte est la seule preuve qu'ils soient devenus conjointement en possession d'une partie des biens qui la composait, savoir: au montant de $15,938.01 pour lequel ils ont admis leur comptabilité. Quant au surplus, consistant dans la somme de $30,015.33, due

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par *William Darling Jun.* qui nie la devoir, elle n'a jamais passé en la possession des autres exécuteurs. *William Darling Jun.* chez qui s'est opéré la confusion de ses qualités de débiteur et d'exécuteur testamemtaire, en est toujours demeuré seul en possession, et doit en être tenu seul responsable en sa qualité d'exécuteur testamentaire. D'après ce qui précède on ne peut certainement pas conclure que les exécuteurs testamentaires sont devenus solidairement responsables.

Ce n'est pas non plus en vertu de l'Art 913 du *Code Civil*, que l'on peut les déclarer tenus solidairement de payer le reliquat du compte. Le 3ème paragraphe de cet article s'exprime ainsi:

> Les exécuteurs qui exercent les pouvoirs conjoints sont tenus solidairement de rendre un seul et même compte.

La solidarité établie ici ne porte évidemment que sur l'obligation de rendre *un seul et même compte.*

S'il y avait eu intention de l'étendre au paiement du reliquat du compte, les codificateurs n'auraient pas manqué de l'exprimer formellement, parceque c'eût été introduire une importante dérogation à l'ancien droit, qu'il était de leur devoir de signaler.

Comme il est de principe que la solidarité ne peut point, par analogie, être étendue d'un cas à un autre, les codificateurs ne l'ayant appliquée qu'à l'obligation de *rendre un seul et même compte*, on ne peut pas en conclure par induction qu'ils ont voulu l'étendre au paiement du reliquat de compte. Il me semble que par cet article, loin de prononcer la solidarité, le 4ème paragraphe dit positivement le contraire. Il y est déclaré en ces termes:

> Il (les exécuteurs) ne sont déclarés responsables que chacun pour leur part de biens *dont ils ont pris possession en leur qualité conjointe, et du paiement du reliquat de compte.*

Suivant ma manière de lire l'Art. 913, le paragraphe 3ème oblige solidairement les exécuteurs conjoints, seu-

lement à rendre un seul et même compte. Ce qui serait plus correctement exprimé, en disant que cette obligation de rendre compte est indivisible ; et le 4ème paragraphe définit et limite leur responsabilité à la part des biens dont chacun d'eux a pris possession. Cette conclusion paraît surtout raisonnable lorsque l'on réfléchit que les fonctions des exécuteurs testamentaires sont gratuites et toutes de confiance. On comprend plus facilement alors le motif du législateur en n'y attachant pas la rigoureuse condition de la solidarité, condition qui serait de nature, dans bien des cas, à faire refuser ces fonctions.

Dans leur rapport sur cet article les codificateurs déclarent qu'il est suivant les autorités tant françaises qu'anglaises. Ni dans l'un ni dans l'autre de ces deux systèmes, les exécuteurs testamentaires ne sont tenus solidairement des actes les uns des autres.

L'Art 1033 du *Code Civil* français dit :

S'il y a plusieurs exécuteurs testamentaires, * * * ils seront solidairement responsables du *compte du mobilier* qui leur a été confié, à moins que le testateur n'ait divisé leur fonctions.

Suivant *Demolombe* plusieurs commentateurs ont donné une trop grande étendue à cette solidarité qui, suivant son avis, doit être limitée à l'obligation de ne rendre qu'un seul compte et ne s'étend pas jusqu'à les rendre solidaires du paiement du reliquat de compte. Voici comment il s'exprime à ce sujet (1) :

S'agit-il de la responsabilité des faits relatifs à l'exécution testamentaire ? Chacun répond de soi sans doute pour le tout ; mais chacun ne répond que de soi et n'est pas solidaire des autres.

On a enseigné, toutefois, la doctrine contraire, et que l'article 1033, dérogeant à l'article 1995, établissait la solidarité des exécuteurs testamentaires, relativement aux actes de leur gestion (Comp. *Delvincour*, t. 11, p. 95, note 8 ; *Coin-Delisle*, art. 1033 ; *Marcadé*, art. 1033, No. 1).

Mais l'article 1033 ne nous paraît dire rien de pareil ; ce qui en

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résulte seulement, c'est que les exécuteurs testamentaires seront solidairement responsables *du compte du mobilier qui leur a été confié;* donc, il n'établit pas la solidarité pour les faits de l'exécution testamentaire, mais seulement *pour le compte du mobilier.*

De là deux conséquences :—

1°. En aucun cas, lors même que le mobilier leur a été confié, les exécuteurs ne sont solidaires de leur gestion réciproque ; et cela est très juste, puisque chacun d'eux peut agir seul, sans le concours des autres. Nous savons bien que l'on a répondu que, si cette solidarité les effraye, ils peuvent refuser ! Oh ! certainement ! et ils n'y manqueraient pas sans doute, si telle était la condition qu'ils dussent subir ! mais apparemment, on ne nomme pas des exécuteurs testamentaires pour qu'ils refusent ; et la loi n'a pas dû leur faire en conséquence une situation inacceptable.

2°. Ils ne sont solidairement responsables du compte du mobilier, que dans le cas où *il leur a été confié*, c'est-à-dire seulement lorsque le testateur leur en a donné la saisine. (Comp. *Duranton*, t. 9, No. 423 ; *Demante*, t. 4, No. 178 ; *Bayle-Mouillard sur Grenier*, t. 3, No. 329, note 6 ; *Troplony*, t. 4, No. 2041).

40.—Et même, en ce qui concerne la responsabilité solidaire du compte du mobilier, la manière, dont on l'explique généralement, nous porte à croire qu'elle a été étendue au-delà de ces véritables termes.

La conclusion, que l'on déduit, en générale, de l'article 1033, paraît bien être en effet, que les exécuteurs testamentaires, dont les fonctions n'ont pas été divisées, et auxquels le testateur a donné la saisine du mobilier, sont solidairement responsables du mobilier lui-même, c'est-à-dire de la représentation effective de ce mobilier ou de sa valeur. (Comp. les *citations supra* No. 38).

Mais il nous semble que telle n'est pas la portée de l'article 1033, lorsqu'il déclare que les exécuteurs testamentaires sont solidairement responsables *du compte du mobilier* ; il ne dit pas, en effet, *solidairement responsables du mobilier* ; et ces deux formules sont certainement différentes.

L'un des exécuteurs, par exemple, a disparu, emportant une partie des valeurs mobilières de la succession ; les autres sont-ils solidairement responsables de ces valeurs, en ce sens qu'ils sont tenus de les payer eux-mêmes de leurs propres deniers ?

Nous ne les croirions pas ; obligés qu'ils sont de rendre compte du mobilier, il faudra sans doute qu'ils prouvent que ce détournement a été commis par l'un des exécuteurs ; mais une fois cette preuve faite, est-ce qu'il ne leur suffira pas de porter, en compte, cette valeur perdue sans aucun fait, qui leur soit imputable ? il faut, suivant

nous répondre affirmativement; sans quoi, on arriverait à établir une vraie solidarité entre les exécuteurs, qui se trouveraient responsables les uns de la faute des autres (voyez article 1205); il y aurait là, en outre une contradiction dans l'article 1033, lui-même, qui, tout en déclarant que chacun des exécuteurs ne répond que de ses faits, le rendrait en même temps, responsable des détournements commis par les autres!

Duranton, [vol. 9, No. 423, p. 394,] développe la même doctrine.

Poujol, [Donations et Testaments, vol. 2, p. 356,] s'exprime ainsi sur la même question:

Cette responsabilité est au surplus limitée au compte du mobilier qui leur a été confié.

Troplong, [des Donations et Testaments, No. 2041,] dit:

Qu'en principe les exécuteurs testamentaires, même dans le cas où leurs fonctions ne sont pas divisées, ne sont pas responsables solidairement les uns des autres.

Grenier: [des Donations, vol. 3, p. 8, Note de *Bayle-Mouillard*;]

Mais il faut se garder d'ajouter à la rigeur de cette responsabilité.

De Laporte [9, *Pandectes* Françaises, p. 190, sur l'art. 1033,] dit que,—

Tous les auteurs enseignent que chacun des exécuteurs testamentaires n'est responsable que pour sa part du reliquat, en convenant que l'obligation de rendre le compte est solidaire pour éviter la multiplication des contestations.

C'est évidemment cette doctrine que les codificateurs ont adopté dans l'article 913. La solidarité se bornerait donc à l'obligation de rendre compte, et quant au paiement du reliquat chacun en paiera sa part suivant la proportion des biens dont il est devenu en possession.

Faisant application de cette doctrine aux faits de cette cause, je suis d'avis que les trois exécuteurs testamentaires Appelants en cette cause et rendant compte, devraient être conjointement condamnés à payer un septième de la somme de $14,510.33, et *William Darling Jun.*, comme étant et ayant toujours été seul en possession de la somme de $30,015.33, condamné seul à en payer un septième. Ces montants réunis

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forment la somme de $6,360.80 revenant à chacun des légataires sur la valeur totale de la succession. L'intérêt doit être réduit à 6 par cent parcequ'il n'a été fait aucune preuve d'une convention le fixant à un taux plus élevé.

THE CHIEF JUSTICE, AND RITCHIE, STRONG & HENRY J. J., concurred.

Appeal dismissed with costs, with certain variations in the judgment of the court below as to joint liability of executors and as to interest.

Solicitors for Appellants: *Cross, Lunn & Davidson.*

Solicitors for Respondents: *Bethume & Bethume.*