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*Nov. 10.
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*April 19.

WILLIAM HARRINGTON, *et al.*, (DEFENDANTS *en garantie* IN THE SUPERIOR COURT) ..... } APPELLANTS;

AND

NORTON B. CORSE, *es-qualite*, (PLAINTIFF *en garantie* IN THE SUPERIOR COURT) ..... } RESPONDENT.

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

Will, Construction of—Art. 889, *Civil Code—Liability of universal legatee for hypothec on immoveables bequeathed to a particular legatee.*

On the 30th April, 1869, *H. S.* being indebted to *J. P.* in the sum of $3,000, granted a hypothec on certain real estate which he owned in the city of *Montreal*. On 28th June, 1870, *H. S.* made his will, in which the following clause is to be found: "That all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named as soon as possible after my death." By another clause he left to *W. H.* in usufruct, and to his children in property, the said immoveables which had been hypothecated to secure the said debt of $3,000. In 1879 *H. S.* died, and a suit was brought against the representative of his estate to recover this sum of $3,000 and interest.

Held,—(Reversing the judgment of the Court of Queen's Bench, *Strong*, J., dissenting.): That the direction by the testator to pay all his debts included the debt of $3,000 secured by the hypothec.

Per *Fournier*, *Taschereau* and *Gwynne*, JJ.: When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, art. 889 of the C. C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee.

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*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) confirming the judgment of the Superior Court (*Montreal*) (1).

An action was brought by *Kate Ann Parkin* against the respondent *N. B. Corse*, as sole surviving executor of the last will and testament of the late *Hiram Seymour*, for the recovery of $3,150 and interest due under an obligation of date the 30th April, 1869, given by the late *Hiram Seymour* to the executors of the late *James Parkin*, and transferred to the plaintiff *Kate Ann Parkin*, by which the house and premises, No. 9 *Beaver Hall*, were specially hypothecated, the said obligation being duly registered. The respondent thereupon called *en garantie* the now appellants, special legatees under the last will and testament of *Hiram Seymour*, requesting them to discharge the debt, alleging that the universal legatees under *Hiram Seymour's* will had notified him not to pay the debt, but to claim it from the special legatees. The appellants refused to take up the *fait et cause.* of *Corse* and pleaded to this action *en garantie.* The following question of law was submitted to the court, viz:—

Does the special legatee of an immoveable property, hypothecated by the testator for a debt of his own due at the time of his death, take the property subject to the hypothec upon it, or is the universal legatee, or legatee by general title, bound to discharge the hypothec that is, to pay the debt, when not obliged to do so by the will?

The chief point submitted to the court turned upon the interpretation of articles 735, 740, 741 and 839 of the civil code *Lower Canada.*

These articles are as follows:—

Art. 735. An heir who comes alone to the succession is bound to discharge all the debts and liabilities. The same rule applies to

(1) 26 L. C. Jur. 79.

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a universal legatee. A legatee by general title is held to contribute in proportion to his share in the succession. A particular legatee is bound only in case of the insufficiency of the other property, and is also subject to hypothecary claims against the property bequeathed, saving his recourse against those who are held personally.

Art. 740. An heir or universal legatee, or a legatee under general title, who, not being personally bound, pays the hypothecary debts charged upon the immoveable included in his share, becomes subrogated in all the rights of the creditor against the other co-heirs or co-legatees for their share.

Art. 741. A particular legatee who pays an hypothecary debt for which he is not liable, in order to free the immoveable bequeathed to him, has his recourse against those who take the succession, each for his share, with subrogation in the same manner as any other person acquiring under particular title.

[Art. 889. If before or since the will, the immoveable bequeathed have been hypothecated for a debt of the testator remaining still due, or even for the debt of a third person, whether it was known or not to the testator, the heir, or the universal legatee, or the legatee by general title, is not bound to discharge the hypothec, unless he is obliged to do so by the will.]

A usufruct established upon the thing bequeathed is also borne without recourse by the particular legatee. The same rule applies to servitudes.

If, however, the hypothecary debt of a third person, of which the testator was ignorant, affect at the same time the particular legacy and the property remaining in the succession, the benefit of division may reciprocally be claimed.

Mr. *Doutre*, Q. C., for appellants; and Mr. *Strachan Bethune*, Q. C., and Mr. *Robertson*, Q. C., for respondent. The arguments of counsel and authorities relied on are fully noticed in the judgments of the Court of Queen's Bench, reported in 26 L. C. Jurist, p. 79, and in the judgments hereinafter given.

RITCHIE, C.J.:

The clauses in the will and codicils relied on are the following:

Thirdly.—That all my just debts, funeral and testamentary ex-

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penses be paid by my executors hereinafter named, as soon as possible after my death.

Now therefore I give, devise and bequeath to the said *Wm. Harrington* during the time of his natural life, the use, usufruct and enjoyment of my house No. 19, *Beaver Hall Terrace, Montreal*, aforesaid, with the lot of ground on which the same is built as aforesaid, the whole as described in the said will, and after the death of the said *Wm. Harrington*, I give, devise and bequeath the same *en pleine propriété* to the four children issue of his marriage with my said late daughter *Laura*, and to the survivors of them in equal proportions, share and share alike.

And by the said codicil the said testator ratified and confirmed said last will.

By article 919 "The Testamentary Executor pays the debts and discharges the particular legacies with the consent of the heir, or of the legatee who receives the succession, or, after calling in such heir or legatee, with the authorization of the court." This article and article 889, read in connection with the evidence in this case, leaves in my mind no difficulty in satisfactorily determining this case without discussing the other question raised.

This places the office and duty of executors on a very different footing from that of an executor under the English law, where the absolute duty is cast on the executor of paying the debts of the deceased without any consent or authorization, and therefore while it may be said, under the English law, that a clause directing the executor to pay the debts of the testator is a mere formal one, adding nothing to the position or legal obligations of the executor, it is, under article 919 C. C., clearly defined and affects the position and duty of the executor and imposes on him others than that obligatory by the law without such a provision, viz., absolutely to pay the debts without either consent or authorization, and that the testator intended that this was to be an absolute duty obligatory on the

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defendant sufficiently to relieve the immoveable bequeathed from the hypothecary debt appears from the clause read in connection with the other provisions of the will which, to my mind, very clearly indicates that such bequest was free from such hypothecary claim. The will shows, in no uncertain manner, in my opinion, that the daughter was to be on a par with her sisters, which could not be if this hypothecary debt wiped away the bequest to her.

Therefore there is a clear indication on the face of the will, as well as in the express words of the code, that he intended to oblige his executor to pay all his debts, including the hypothec in question, and the appeal should be allowed.

STRONG, J: was opinion that the appeal should be dismissed for the reasons given by the majority the Court of Queen's Bench.

FOURNIER, J.:—

La première question soulevée en cette cause est de savoir lequel, du légataire universel, ou du légataire particulier, doit, depuis l'adoption de l'article 889, C. C., acquitter une dette en paiement de laquelle le testateur a hypothéqué un immeuble compris dans un legs particulier. 2o. D'après les dispositions du testament dont il s'agit en cette cause, y a-t-il lieu de faire application au cas actuel de l'article 889?

Avant la promulgation du Code Civil cette question ne pouvait souffrir de difficulté. Il est indubitable que dans l'ancien droit français c'était à l'héritier ou légataire universel à acquitter l'hypothèque grevant une propriété comprise dans un legs particulier. Les codificateurs chargés de déclarer quel était l'ancien

droit à ce sujet ont formellement exprimé leur opinion comme suit (1):

If a thing bequeathed by a particular title be pledged or hypothecated for a debt due by the testator, or for any other debt, which, either before or after his will, be known to affect the particular legacy, the heir, or the universal legatee by general title, is bound to free it from such debt.

L'article 889 a-t-il changé l'ancien droit sous ce rapport et imposé au légataire particulier au lieu de l'héritier ou légataire universel l'obligation de payer cette hypothèque? La Cour Supérieure, siégeant à Montréal, dont le jugement a été confirmé par une majorité de la Cour du Banc de la Reine, a décidé cette question dans l'affirmative.

L'article 889 est ainsi conçu:

Si, avant le testament, ou depuis, l'immeuble légué a été hypothéqué pour une dette restée due, ou même s'il se trouve hypothéqué pour la dette d'un tiers, connu ou non du testateur, l'héritier ou le légataire universel, ou à titre universel, n'est pas *tenu de l'hypothèque*, à moins qu'il n'en soit chargé en vertu du testament.

L'usufruit constitué sur la chose léguée est aussi supporté sans recours par le légataire particulier. Il en est de même des servitudes.

Si, cependant, l'hypothèque pour une dette étrangère, inconnue au testateur, affecte en même temps le legs particulier et les biens demeurés dans la succession, rien n'empêche que le bénéfice de division ait lieu réciproquement.

Dans le cas particulier dont il s'agit il était à peine nécessaire d'entrer dans l'examen de la première question, mais puisqu'elle a été soulevée, il vaut mieux dans l'intérêt public qu'elle soit décidée de suite. Après avoir non-seulement lu, mais étudié attentivement, les savantes dissertations des honorables juges de la Cour du Banc de la Reine sur ce sujet, je me suis convaincu que les raisons données par les honorables juges *Tessier* et *Cross* devaient l'emporter sur celles de leurs collègues, et je pense, comme eux, que l'article 889 n'a

(1) No. 140, p. 363, Nos. 4 et 5 des Donations testamentaires.

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pas changé l'ancien droit à cet égard. C'est encore, suivant moi, à l'héritier ou au légataire universel à acquitter l'hypothèque grevant une propriété comprise dans un legs particulier.

Le testateur a, en outre, lui-même décidé cette question par les dispositions de son testament.

Par l'article 3 de son testament il ordonne en ces termes le paiement de ses dettes:

That *all* my just debts, funeral and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my death.

Mais, objecte-t-on, cette clause est insuffisante pour décharger le légataire particulier de l'obligation d'acquitter l'hypothèque. Les exécuteurs testamentaires étant déjà obligés par la loi de payer les dettes du testateur (art. 919), cette clause est de style et n'ajoute rien aux obligations légales de l'exécuteur, et elle n'est pas une preuve que le testateur avait l'intention de faire payer par les légataires universels une dette hypothécaire payable par le légataire particulier. Je ne puis adopter cette manière de voir.

La comparaison de la disposition testamentaire au sujet du paiement des dettes avec l'article 919, semble conduire à une conclusion tout-à-fait contraire. Les pouvoirs de l'exécuteur testamentaire au sujet du paiement des dettes sont très restreints d'après cet article. Ils ne le sont aucunement d'après le testament qui fait l'objet de notre examen. En effet l'article 919 dit:

Il (l'exécuteur) paie les dettes et acquitte les legs particuliers, du consentement de l'héritier ou du légataire qui recueillent la succession, ou iceux appelés, avec l'autorisation du tribunal.

Voilà bien des formalités auxquelles la loi assujétit l'exécuteur testamentaire dont les fonctions n'ont pas été modifiées par une extention de pouvoir qu'il est loisible au testateur de faire suivant l'article 921.

L'exécuteur testamentaire ordinaire ne peut donc,

suivant l'article 919, payer ni une dette ni un legs sans avoir obtenu le consentement de l'héritier ou légataire universel ; s'il ne fait pas les démarches nécessaires pour obtenir le consentement il est alors obligé de lui faire des sommations pour les appeler au paiement ou du moins leur en donner un avis préalable. A défaut de ces procédés il doit recourir à l'autorisation judiciaire. Dans le cas actuel l'exécuteur est en vertu de l'article 3 du testament dispensé de recourir à toutes ces formalités. Il a un pouvoir général et absolu de payer les dettes et les legs sans recourir à toutes ces formalités. Si l'intention du testateur eût été de laisser ses exécuteurs soumis aux restrictions légales, il se serait contenté de les nommer sans définir leurs obligations. Mais il est évident qu'il a voulu exercer le privilège que donne l'article 921 de " restreinde ou étendre les pouvoirs, les obligations et la saisine de l'exécuteur testamentaire, et la durée de sa charge."

Lorsque l'on compare l'article 3 du testament avec la clause contenant la nomination des exécuteurs, il ne peut plus y avoir de doute sur la signification à donner à l'obligation imposée dans ce cas de payer toutes les dettes. Le testateur se dessaisit entre leurs mains de tous ses biens, tant mobiliers qu'immobiliers. Il prolonge l'exercice de leurs pouvoirs au delà de la durée légale. Il leur donne le pouvoir de vendre tous ses biens immobiliers, non légués, à tels prix et conditions qu'ils croiront avantageux, et enfin le pouvoir d'administrer tous ses biens comme s'ils leur appartenaient à eux-mêmes. Il n'était guère possible de donner à des exécuteurs testamentaires des pouvoirs plus étendus que ne le comporte cette clause. Ils avaient non-seulement le devoir de payer *toutes* les dettes, mais ils avaient également le pouvoir de vendre toutes les propriétés. N'est-il pas évident, en prenant ensemble les deux clauses du testament, que le testateur a soustrait l'exé-

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cution de ses dernières volontés à l'opération de la loi. Il a profité des pouvoirs que lui donnait l'article 921 pour faire sa propre loi aux exécuteurs testamentaires. Dans l'exécution des devoirs qu'il leur a tracés, il ne leur a fait d'autre loi que ses volontés, manifestées par le testament, et il ne les a soumis, en outre, à d'autres règles que celles que leur dicteraient leur conscience, leur prudence et leur bon jugement, comme hommes d'affaires

L'effet de telles dispositions était évidemment de mettre de côté l'article 889, tout aussi bien que les autres articles concernant le paiement des dettes, la saisine des immeubles, la durée de l'exécution testamentaire.

L'obligation de payer *toutes les dettes* résultant inévitablement du testament, peut-on distinguer entre les dettes celles qui sont garanties par hypothèques de celles qui ne le sont pas, lorsque le testateur n'a pas distingué ? A moins que la loi n'ait fait à ce sujet une distinction qui s'impose, on ne peut pas non plus faire cette distinction sans enfreindre la volonté du testateur et sans faire pour lui une distinction qu'il n'a certainement pas voulu faire.

Mais la loi fait-elle une distinction entre une dette garantie par hypothèque et celle qui ne l'est pas. La première est-elle d'une nature différente de la seconde, forme-t-elle une classe distincte soumise à des principes différents ? La loi ne fait aucune différence à cet égard. Une hypothèque ne peut pas exister par elle-même et indépendamment d'une dette dont elle est l'accessoire. Elle n'est (l'hypothèque) dit le code, art. 2017, qu'un accessoire et ne vaut qu'autant que la créance ou obligation qu'elle assure subsiste. Il faut inévitablement en conclure qu'en disant à ses exécuteurs testamentaires de payer toutes ses dettes, le

testateur dans le cas présent a compris également celles qui étaient garanties par hypothèques.

En venir à une autre conclusion serait dans le cas actuel contrevenir aux intentions du testateur; ce serait déranger la distribution équitable et, autant que les circonstances le lui ont permis, égale de ses biens entre ses enfants. Le testateur avait trois filles et deux garçons. Parmi les biens de sa succession se trouvent trois maisons situées au *Beaver Hall Hill*, *Montréal*, étant les Nos. 19, 21, 23. Il donne à sa fille *Maria Eliza Seymour* veuve de *Jean Bruneau*, en usufruit, la maison No. 21, et la propriété à ses enfants pour être partagée par égales proportions. Le No. 23 est légué en usufruit à son fils *C. E. Seymour* et à sa femme, et après leur décès en pleine propriété à leurs enfants. A *Laura Seymour*, épouse, depuis décédée, de l'appelant, il lègue la propriété du No. 19 pour en disposer comme bon lui semble.

A dame *Charlotte Seymour*, épouse de *B. J. Heinsley*, il lègue $4,000, avec cette déclaration :—

This bequest I desire my daughter to regard as an expression of love and esteem, she being by God's blessing amply provided for. I have therefore not placed her on a par with my other daughters in this my will, who are more in need of it.

Son fils, *Melancthon H. Seymour*, ayant eu par anticipation tout ce qu'il aurait eu droit d'avoir dans sa succession, il lui fait en outre remise de tout ce qu'il peut lui devoir.

Il donne encore à ses deux filles, *Maria Eliza*, veuve *Bruneau*, et *Laura*, épouse de *Harington*, $3,000 chacune, payables après la mort de leur mère.

Il y a un legs en faveur de cette dernière de tous les biens mobiliers contenus dans la maison No. 23.

Enfin, il veut qu'après la mort de son épouse et l'exécution de ses divers legs dûment faite (*and after the foregoing bequests duly made*), que le résidu de sa suc-

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cession, quel qu'en soit le montant, soit également divisé entre ses trois filles, ci-dessus nommées, par parts égales (*share and share alike*), les instituant ses légataires résiduaires.

Il termine son testament par la clause citée plus haut définissant les pouvoirs des exécuteurs testamentaires.

Ce testament ne démontre-t-il pas clairement que l'intention du testateur était de regler lui-même sa succession et de n'en rien laisser à l'opération de la loi? Ne fait-il pas voir en même temps à l'évidence qu'il voulait autant que possible conserver l'égalité entre ses enfants, surtout entre ses filles, en donnant la raison pour laquelle il ne place pas Madame *Heiusley* sur un pied d'égalité (*on a par*) avec ses deux autres filles. Il donne encore à chacune de ces premières une somme de $3,000, et, enfin, les institue toutes trois par parts égales légataires résiduaires. On voit aussi qu'il voulait mettre ses deux fils sur un pied d'égalité par la déclaration qu'il fait, que son fils, *M. H. Seymour*, ayant déjà reçu sa part, il lui fait remise de ce qu'il peut encore lui devoir. Peut-on croire après toutes ces déclarations, et surtout après l'injonction formelle de payer *toutes* ses dettes, que le testateur avait en vue de déranger le partage si bien ajusté de sa succession en laissant porter à l'un des légataires seul la charge d'acquitter l'obligation de $3,000, effectant une des propriétés léguées. Il n'y a certainement pas songé un instant. Mais on peut dire qu'il avait pu avoir l'idée de la difficulté si ingénieusement soulevée ici, difficulté que ne soupçonnait certainement alors ni les testateurs ni les notaires. On pourrait dire encore qu'il a pris les moyens nécessaires de la trancher en ordonnant le paiement de toutes ses dettes comme première disposition de sa succession. En se mettant au point de vue du testateur on comprend mieux toute la portée de cette déclaration.

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La mort de sa femme et celle de *Laura*, Madame *Harrington*, ont forcé le testateur de modifier son testament par deux codicilles. Les dispositions de ces codicilles n'affectent aucunement la signification que doit avoir dans le testament l'injonction de payer toutes les dettes. Par le premier de ces codicilles il institue, en conséquence du décès de sa femme, ses deux fils légataires résiduaires conjointement avec ses trois filles. Ainsi il y a maintenant cinq légataires résiduaires au lieu de trois. Par le deuxième, en conséquence de la mort de Madame *Harrington*, légataire en pleine propriété de la maison No. 19, il institue *Harrington*, mari de cette dernière, légataire en usufruit et leurs quatre enfants légataires en pleine propriété. Ce codicille semble n'avoir pas eu d'autre objet que d'étendre la libéralité du testateur jusqu'à l'appelant, qui par le prédécès de son épouse se trouvait à ne recevoir aucun avantage personnel dans la succession du testateur. L'idée de réparer cette omission semble avoir été l'unique préoccupation du testateur. Pensait-il par hasard que le legs de $3,000 et la part attribuée dans le résidu de la succession à Madame *Harrington* passeraient aux enfants de cette dernière? Malheureusement il n'en peut être ainsi. Ces legs sont devenus caducs par le prédécès de leur mère. Il ne reste à ces petits-enfants du testateur que la propriété de la maison No. 19.

Qu'arrivera-t-il si la prétention de faire porter aux légataires particuliers la charge de payer seuls l'hypothèque affectant la maison No. 19 qui leur est léguée, est maintenue? Privés sans doute par pure inadvertance des deux autres legs faits à leur mère, ils se verraient encore enlever la meilleure partie de leur legs s'ils étaient condamnés à payer l'hypothèque de $3,000 affectant la maison qui leur est léguée. En recherchant dans les dispositions du testament quelle a été l'intention du testateur est-il possible d'en arriver à une

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conclusion semblable? Rien ne me paraît avoir été plus loin de l'intention du testateur dont les dispositions repoussent toute idée d'un pareil résultat.

Bien plus, les légataires universels dans ce cas n'étant légataires que du résidu de la succession aux conditions formellement imposées par le testateur aux exécuteurs testamentaires, savoir: 1° paiement de toutes les dettes, 2° exécution de tous les legs particuliers, ne faut-il pas avant que l'on puisse constater un résidu, faire défalcation de toutes les dettes et de tous les legs particuliers.

Si les exécuteurs testamentaires saisis de tous les biens veulent exécuter leur mandat (*trust*) c'est l'opération qu'ils sont obligés de faire avant de remettre aux légataires universels le résidu des biens. Ceci est d'autant plus évident que le testateur en ne dépassant son actif, assurait à son point de vue l'exécution de toutes ses libéralités.

Il me paraît, en conséquence, clair que la nature du testament dont il s'agit rend impossible l'application au cas actuel de l'article 889.

Il me semble que cette question ne pourrait guère être soulevée que dans un cas où le testateur n'ayant fait aucune disposition quant au paiement de ses dettes, c'est alors à la loi à régler ce qui ne l'a pas été par le testament. J'ai donné à cette importante question si habilement traitée de part et d'autre dans les savantes dissertations des honorables juges qui ont été appelés à exprimer leurs opinions, toute l'attention qu'elle mérite; cependant je n'ai arriver à la même conclusion que ces Honorables juges sur l'interprétation à donner à l'art. 889, et je suis d'opinion que celle qu'ils ont adoptée ne devrait pas prévaloir.

Je me permettrai d'ajouter que l'interprétation de l'art. 889 adoptée par la majorité de la Cour du Banc de la Reine ne peut manquer d'entraîner des conséquences de

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la plus haute gravité. Cette question, soulevée en cette cause pour la première fois, n'a jamais attiré, que je sache, l'attention des testateurs ni des notaires. Si cette interprétation devait prévaloir que d'arrangements de famille, faits depuis la publication du code civil, vont être troublés. N'y aurait-il pas lieu dans ce cas à l'intervention de la législature pour donner à l'interprétation qui paraîtra la plus en harmonie avec l'esprit du code civil, la sanction législative?

HENRY, J. :—

I think the intention of the testator is very clear to divide his property among his daughters, and I think the direction to the executor was merely intended to take away the right of the party in whose favour the bequest was made to call upon the heir at law to pay off the hypothec. The effect of the law in the Province of *Quebec* is a little different from what it would be in other provinces. The executors in the other provinces and in *England* are called upon to pay the debts, while in *Quebec* they have nothing to do with the debts unless the testator calls upon them to do so. In this will there is a clear direction to pay all the debts, and it includes this hypothecary debt as well as the other debts. I think, therefore, the appeal should be allowed.

TASCHEREAU, J. :—

On both of the points urged by the appellant, I am of opinion to allow this appeal.

In addition to the cogent reasoning of *Tessier* and *Cross*, JJ., in the Court of Queen's Bench, in support of the view that art. 889 of the code does not make a particular legatee liable, without recourse, for the debt of the testator hypothecated upon the immoveable bequeathed to him, I remark that the said article of the civil code relates only to immoveables; and this not in-

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advertently, since art. 140 of the report of the codifiers, which it purports to amend, gives the law both as to pledge of moveables and as to hypothec of immoveables, so that clearly as to moveables, the rule is still that a debt of the testator is not payable by the particular legatee. If, for instance, he leaves to his particular legatee a watch which, at his death, is pledged for a certain debt, this debt has to be paid by the heir or universal legatee. Have the codifiers intended that a different rule should prevail as to immoveables ? Up to the code, moveables and immoveables have certainly always been on the same footing in this respect, and there were no reasons that I can see for creating a difference between them. I entirely concur in the reasoning of *Tessier* and *Cross*, JJ., in the Court of Appeal, and hold with them that this article does not bear the interpretation that the particular legatee is liable for the payment of the debts hypothecated on the immoveable left to him, without recourse against the heir or universal legatee.

On the other point, I am also with the appellant.

I am of opinion that if, as held by the courts below, the law was now that, unless otherwise ordered by the testator, the particular legatee is liable for the debt hypothecated on the immoveable bequeathed to him, the respondent here would even then not be liable for the debt in question in this cause, because *Seymour*, the testator, has ordered the contrary. The clause of his will relating thereto is :

> That all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named as soon as possible after my death.

Does not this mean, nay, more, say, in as clear terms as possible, "all my debts ?" Can it be read as meaning only his chirographary and not his hypothecary debts ? I cannot see upon what principle this could be done.

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Now, when the testator said "all my debts," we cannot make him say "not all my debts," or may be "no debt at all," for this debt in question here may be the only one the testator owed.

This debt of $3,000 *Seymour* had contracted on the 30th April, 1869. On the 28th June, 1870, he begins his will by ordering his executor to pay all his debts, and then makes to the respondent and others certain particular legacies. This, it seems to me, shows not only that the testator intended these particular legacies to be free from all debts, but that he had this particular debt in his mind when he ordered his executor to pay all his debts. I cannot accede to the proposition that we may treat, as a matter of form and of no meaning whatsoever, this clause of the will by which *Seymour* orders the payment of his debts. I know of no rule under which we would be authorized to set at nought any part of a will under pretence that it is merely a matter of form. This clause, like all the others, must have its execution. If the law is, as it was before the code, that the particular legatee is not liable for the debts of the testator, the appellant must succeed independently of this clause of the will. If, on the contrary, the law was now, as held by the courts below, that the particular legatee must pay, without recourse, the debt hypothecated upon the immoveable bequeathed to him, unless the heir or universal legatee is obliged to do so by the will, then the clause of the will ordering all the debts to be paid by the executor is far from being a clause *banale*. To say that, as the law orders the executor to pay the testator's debts, this clause of *Seymour's* will means nothing, seems to me to be taking for granted that it does not include the debt hypothecated on the property bequeathed to the appellant. The law does not order the executor to pay this particular debt, if the interpretation given to the code by

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the majority of the court below is correct, but this clause of *Seymour's* will does it, as I read it, in as plain terms as possible.

Two *arrêts* of the *Parlement de Paris*, cited in *Merlin's* Rep. (1), relating to the meaning of the words in a will "pay my debts," have some analogy with the present case.

In the first case the will was as follows :—

"Je lègue à Madame *de Mailloc* et à Madame *de Buvron* tout ce que je peux leur donner je les prie de faire prier Dieu pour moi, *payer mes dettes* et récompenser mes domestiques." Cette disposition (says *Merlin*) a fait naître la question de savoir si les héritiers des propres devaient contribuer aux dettes. Une sentence par défaut du châtelet avait prononcé l'affirmative. Mais par arrêt rendu le 22 juin 1728, cette sentence a été infirmée, et il a été ordonné que les héritiers jouisaient des propres sans être tenus de contribuer à aucune dette.

The second case is given by *Merlin* as follows :—

La dame de *Talard* faisant son testament, s'était expliqué en ces termes : "Je veux que mes dettes soient payées sur mes biens patrimoniaux. J'institue le prince de *Rochefort* légataire universel de tous mes sus-dits biens en toute jouissance et propriété, à la charge toutefois de payer les dettes de ma succession et acquitter sur les biens fonds les legs que j'ai faits." Après sa mort, contestation entre les héritiers et le légataire universel pour la contribution aux dettes. La difficulté naissait de ce que la dame de *Talard* avait d'abord chargé ses biens patrimoniaux d'acquitter les dettes, et qu'elle en avait ensuite chargé son légataire universel, auquel elle ne pouvait laisser qu'une partie de ses propres. Le légataire universel disait que, dans de pareilles circonstances, il fallait consulter le droit commun, suivant lequel les réserves coutumières contribuent aux dettes, avec les objets compris dans le legs universel : "Mais par sentence des requêtes du palais, du 24 avril 1755, confirmée par arrêt rendu le 17 juillet de la même année, sur les conclusions de M. *Joly de Fleury* avocat-général, le parlement de *Paris* a jugé que les héritiers ne contribueraient pas aux dettes pour les réserves coutumières, et que le légataire universel le paierait seul."

I am of opinion to allow the appeal and to dismiss the action *en garantie*, with costs in the three courts against the respondent.

(1) Vo. Légataire.

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I remark that, though the registration of the obligation upon which is based the principal action is admitted at the *enquête*, such registration is not alleged either in the principal demand nor in the declaration *en garantie*. In the first, such an allegation was not necessary, but was it not in the second? I also remark that the action is upon a transfer to the plaintiff by the original creditors of the sum due by the late *Seymour*, and that the only signification of that transfer alleged by the plaintiff is a signification to *Corse*. If *Corse*, as held by the court below, was not liable for this sum, is the signification of the transfer upon him sufficient?

GWYNNE, J.:—

Although I fully concur in the judgment of my brother *Taschereau* (which I have had the opportunity of seeing) upon the question which has been so fully and ably discussed by the learned judges in the courts below and by the learned counsel in their argument before us, as to the true construction of the expression in article 889 of the civil code of the Province of *Quebec*, namely :—"L'héritier ou le légataire universel ou à titre "universel n'est pas tenu de l'hypothéque," as it is in the French text, and "The heir or the universal legatee "or the legatee by general title is not bound to dis- "charge the hypothec," as it is in the English text, still it is not, in my opinion, necessary that our judgment should be rested on that point, for, assuming the true construction to be that the universal legatee is not bound to pay the mortgage debt, I am of opinion that upon the other point argued the appellants are entitled to our judgment in their favor. The article provides that :

If before or since the will an immovable bequeathed be hypothecated for a debt of the testator remaining due, or even for the debt of a third person, whether it was known or not to the testator, the heir, or the universal legatee or the legatee by general title is not

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bound to discharge the hypotheque unless he is obliged to do so by the will.

Reading then these words "discharge the hypotheque" as synonymous with "pay the mortgage debt," I am of opinion that the testator has, by his will, sufficiently clearly expressed his intention to be that the special legatee shall in this case enjoy the immoveable bequeathed free from all liability to pay the debt secured by hypothec upon it, for payment of which special provision is made by the will.

Construing the words used in the article as above, a somewhat similar provision is made by the English Act, 17th and 18th *Vic.*, ch. 113, by which it was enacted that when any person should, after the 31st December, 1854, die seized of or entitled to any estate or interest in any land or other hereditaments which should, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person should not, by his will, or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments should descend or be devised should not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but that the lands or hereditaments so charged should, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof.

It will be convenient to review the decisions upon this Act. In *Woolstencroft* v. *Woolstencroft* (1) the question arose before Sir *J. Stuart*, V.C., whether a

(1) 6 Jur. N. S. 866.

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direction by the testator to his executors to pay all his debts out of his estate made his personal estate primarily liable for the payment of a mortgage debt charged on real estate devised by his will. The learned Vice-Chancellor was of opinion that the mortgage debt must be paid out of the personal estate, and he stated the ground of his decision to be, that where there was a direction by the testator that his debts should be paid by his executors, that exonerated the mortgaged estate. In the same year, but after the above decision of Sir *J. Stuart*, the question arose before Vice-Chancellor Sir *W. Page Wood*, in *Pembrooke* v. *Friend* (1), under a will whereby a testator directed that all his just debts, funeral and testamentary expenses should be paid as soon as might be after his decease; but he did not direct the payment to be out of any particular fund, nor did the will contain the words that the payment was to be made "by his executors," and he devised a house which he occupied to his wife in fee. The testator had created an equitable mortgage on the house by deposit of title deeds before his death, and the question was whether or not the personal estate should pay this mortgage. The Vice-Chancellor held that this will contained no sufficient expression of intention of the testator that the mortgage should be paid otherwise than under the provisions of 17th and 18th *Vic.*, ch. 113, that is by the specific devisee of the house, and he supports this conclusion by the following language:

> The testator does not say that the debts are to be paid out of his personal estate or by his executors. Had he used the words "by my executors" there would have been something on which to build the conclusion that he meant to express an intention that the general statutory rule should not apply. There would have been more room for argument if the property had been devised in strict settlement, but the gift to the widow being in fee, there was nothing to prevent a sale for payment of the mortgage debt immediately after the testator's decease.

(1) 1 J. & H. 132.

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Woolstencroft v. *Woolstencroft* came up before Lord Chancellor Lord *Campbell* in appeal (1), who reversed the decision of Sir *J. Stuart*, V.C. The Lord Chancellor says:

> I will not say that the words here relied upon are mere words of style, like the pious phrases with which wills usually begin, but they do not seem to me to show that the testator had in his mind the option given him of making the debt fall upon the mortgaged land or on the personal estate. He does not say that the payment is to be out of his personal estate, but out of his estate generally, and the real estate being charged with all the debts, and the payment having to be made by the executors, the executors would have the means of effecting a sale of part of the real estate, if necessary for that purpose.

And *Pembrooke* v. *Friend* having been cited, the Lord Chancellor says that there the Vice-Chancellor, Sir *W. Page Wood*, seemed to him, merely by the observations made by him, to intend to distinguish the decision of Sir *J. Stuart* in *Woolstencroft* v. *Woolstencroft* from the case of *Pembroke* v. *Friend*; and the Lord Chancellor attributed no weight to the words "by my executors," used in the will in the case before him, because he held and laid down as a rule, that a testator could only signify his intention that the personal estate should pay the mortgage debt by express words, declaring that the devisee of the land mortgaged should take the land free of the debt; that the same rule should be observed with respect to exempting the mortgaged land from the payment of the mortgage debt as was before observed with respect to exempting the personal estate, the mortgage land being by the statute made primarily liable as the personal estate had been previously; but in *Mellish* v. *Vallins* (2), Sir *W. Page Wood* takes the opportunity of showing that the learned Lord Chancellor had fallen into an error in laying down the above rule, arising from a want of due appreciation of the principle upon which the rule of law that to

(1) 2 DeG. F. & J., 347. (2) 2 J. & H. 194.

exempt the personal estate express words to that effect must be used was established, and he held that the rule, as laid down by the Lord Chancellor, could not be of general application, and he held that a bequest of personalty, subject to the payment thereout of all the testator's just debts, following a devise of land in mortgage, which devise made no reference to the mortgage, sufficiently indicated the intention of the testator to be that the land should not be primarily liable to the payment of the mortgage debt, and the decree was that according to the true construction of the testator's will, the mortgage debt and interest ought to be borne by and paid out of his personal estate in exoneration of his real estate.

In *Allen* v. *Allen* (1), where a testatrix had an estate which she had herself mortgaged, and another estate which had been mortgaged by a former owner, and she devised the former for sale and payment of certain legacies, and the residue of her real and personal estate, including that which had been mortgaged by a former owner, to the defendants, directing that mortgages, debts, or other incumbrances on her residuary real and personal estate should be exclusively borne by the premises charged therewith, and that "all her debts and funeral and testamentary expenses should be paid out of her said residuary real and personal estate, Lord *Romilly*, Master of the Rolls, held that the mortgage debt incurred by herself was primarily payable out of the residuary real and personal estate, and not out of the mortgaged estate.

In *Newman* v. *Wilson* (2) where a testator, by his will, devised an estate, which he had subjected to a mortgage, to his wife for life, and afterwards to four of his children and their issue, and he devised all his freehold and leasehold estates and all other his real estate,

(1) 30 Beav. 395. (2) 31 Beav. 33.

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except what he otherwise devised by his will, unto trustees for sale, and he bequeathed all his personal estate to the same trustees upon trust to call in and convert, and he declared that his trustees should stand possessed of the monies to arise from the sale of his real estate, and from the calling in and conversion of his personal estate, upon trust, in the first place, to pay his funeral and testamentary expenses and certain legacies; and it was held that the personal estate and the real estate devised in trust for sale were primarily liable to pay the mortgage debt on the estate devised to the wife for life, &c., &c.

In *Rowson* v. *Harrison* (1), where a testator directed that all his just debts and funeral and testamentary expenses should be paid and discharged by his executors thereinafter named, as soon as conveniently might be after his decease, out of his personal estate, the master of the rolls, holding this case to be governed by the judgment of the Lord Chancellor in *Woolstencroft* v. *Woolstencroft*, held that this will did not indicate the intention of the testator to be that the devisee of the land mortgaged should take the land otherwise than as primarily charged with the mortgage debt; but in *Eno* v. *Tatam* (2), Vice-Chancellor Sir *J. Stuart* held that a devise of personal estate, subject to the payment of the testator's debts, funeral and testamentary expenses, was a sufficient indication of intention to make the personal estate the primary fund for the payment of a debt charged upon an estate particularly devised. The learned Vice-Chancellor there said:

> If I find a will in which there is some intention contrary to the mortgage being a burthen upon the mortgaged estate, I am bound by the language of the Act.

Finding there that there was such intention, he came

(1) 31 Beav. 207. (2) 9 Jur. N. S. 225.

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to the conclusion that the devisee of the personal estate did not take anything until she should pay the mortgage debt.

The Lord Justices, Sir *J. L. Knight Bruce* and Sir *George Turner*, upon appeal (1), affirmed this decision, and laid down the rule that the mortgaged estates are not liable where the debts are directed to be paid out of some other fund; and Sir *George Turner*, referring to the observations of Lord *Campbell*, in *Woolstencroft* v. *Woolstencroft*, that the same rule which was applied to exempt the personal estate, should now be applied to exempt the mortgaged estate, says that he thought that meant no more than that the intention must appear, and that if it meant that it was necessary for the expressions to show an intention, not merely to charge some other fund with the debt, but also to discharge the estate mortgaged, then he was not prepared to follow the decision; and in *Moore* v. *Moore*, which was a case similar to *Rowson* v. *Harrison*, the same lords justices (2), following their decision in *Eno* v. *Tatham*, overruled the decision of the Master of the Rolls, which was similar to that in *Rowson* v. *Harrison*. In *Maxwell* v. *Hyslop* (3), Vice Chancellor *Malins*, who approved of Lord *Campbell's* judgment in *Woolstencroft* v. *Woolstencroft*, and who says that if the Appeal Court had not decided the other way he should have gladly followed it, lays down the rule, as settled by the decisions, to be,—that whenever a testato has mortgaged his estates and, by his will provides a fund, either his residuary personal estate, or an estate devised for the purpose, or the general personal estate and other property mixed up with it, or, in other words, when he provides a fund of any description whatever for the payment of his debts, that is an indication of an intention that the land is not to

(1) 9 Jur. N. S. 481. (2) 1 DeG. J. & S. 602.
(3) L. R. 4 Eq. 407.

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be the primary fund, but that the personal estate, or the particular fund provided, is to exonerate it from the mortgage debt.

By an Act passed by the Imperial Parliament on the 25th July, 1867, 30th and 31st *Vic.*, ch. 69, which was passed to explain the operation of 17th and 18th *Vic.*, ch. 13, it was enacted that in the construction of the will of any person who might die after the 31st day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to, or other than, the rule established by the said Act, unless such contrary or other intention should be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. In *Brownson* v. *Lawrence* (1), which came before the Master of the Rolls in 1868, after the passing of the above Act, but in which the queston arose upon the will of a testator who had died in 1860, the Master of the Rolls, after reviewing *Woolstencroft* v. *Woolstencroft*, *Pembroke* v. *Friend* and *Eno* v. *Tatham*, was of opinion that in construing the wills of testators who have died between the 31st of December, 1854 and the 1st of January, 1868, he must follow *Woolstencroft* v. *Woolstencroft*, or *Eno* v. *Tatham*, according as the words of the will in each particular case came within the exact authority of one or other of those decisions; holding the rule to be that where a testator directs his debts to be paid out of some particular fund or property, or description of property, out of which, according to the rule established by the statute, they would not be primary liable, he must be taken to signify an intention to exclude the statutory

(1) L. R. 6 Eq. 1.

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rule, but where he merely directs his debts to be paid or to be paid out of his estate generally, he does not signify an intention to exclude that rule.

In *Coote* v. *Lowndes* (1), the testator had excluded any such conclusion as an intention that the mortgage debt should be paid out of the personalty, by the disposition in his will whereby he had expressly directed that the devisees in trust of his real estates should, during the minorities of the cestuique trust, receive the rents and profits, and by and out of the same keep down any annuity which might be charged on the premises, and the interest of any sum which might be charged by way of mortgage on the same premises. The alteration made in the English law upon the subject by the Imperial Statute 30th and 31st *Vic.* ch. 69, makes decisions under that Act inapplicable to the present case, but, if the true construction of article 889 be as for the purpose of the present discussion I have assumed it to be, then, as such a construction is at variance with the provisions of the Code *Napoleon* in like cases, and with the law of other countries where the civil law prevails and corresponds with the provisions of the Imperial statute, 17th and 18th *Vic.* ch. 113, we may have recourse to the decisions under this Act to assist us in the determination of the present question.

Now, the principle to be derived from the above English cases is that, if from any provision, express or by necessary implication, in the testator's will, we find his intention to have been that his debts generally, without any specific directions as to his mortgage debts, should be paid out of any particular fund, or part of his estate other than the mortgaged estates, such intention must prevail, and the will must be construed as imposing a primary obligation upon such particular fund, or part of his estate, for the payment of his mortgage

(1) L. R. 10 Eq. 380.

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debts (as well as his other debts) in relief of the mortgaged estates particularly devised; and for the purpose of arriving at the testator's intention upon the point, no particular form of words is necessary, but, as in all other questions arising under the will, the testator's intention is to be gathered from a perusal of the whole will.

Now the testator, in his will, declares his intention to be:

That all my just debts, funeral, and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my decease.

In connection with this clause, and as incorporated with it, we must turn to the clause appointing the executors here referred to, which is as follows:

I appoint my well tried and trusty friends *Edwin Atwater* and *Norton B. Corse*, both of the said city of *Montreal*, Esquires, into whose hands I hereby divest myself of all my property, real or personal, and hereby expressly continuing their powers as such, beyond the year and day limited by law, and with full power to my said executors, or the survivor of them, to sell and dispose of all real estate to me belonging, and not hereby bequeathed, for such prices and on such terms and conditions as he or they may deem most advantageous, and to sign all conveyances and deeds of sale thereof, and to administer generally my said estate as if the same belonged to them personally.

Now these clauses, taken together, express the clear intention of the testator to be to devise the whole of his personal estate to his named executors and to give them complete power of disposition over all of his real estate not bequeathed by the will, to enable his executors, with such particular portion of his estate, to administer his estate generally, and in the course of such administration to pay all his debts as soon as possible after his decease. The bequeathed real estate is specially excepted from the real estate over which, in such administration of the testator's estate, his executors should have any control, and the clause operates as a charge of

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all testator's debts upon the whole of his personalty and that portion of his realty not specifically bequeathed, thus displaying a manifest intention of the testator that his bequeathed realty, of which the tenement and dwelling house in question is a part, should be exempt. The usufructuary life-estate devised to the testator's wife can plainly operate only upon the real estate excepted from the estate, over which, for the purposes of administration, control is given to the executors, and such personal estate, if any, and such real estate, over which the executors were given control, as should remain after the complete administration of the testator's estate, and consequently after the payment of all his debts.

The devise to the wife is as follows:

I give, devise and bequeath to my dearly beloved wife, Dame *Tamer Murray*, the use, usufruct and enjoyment during her natural life of all my property, whether real or personal, moveable or immovable, moneys, stocks, funds, securities for money, and, in fine, everything that I may die possessed of, without any exception, or reserve and without being obliged to render an account thereof to any person whomsoever, hereby constituting my said wife my universal usufructuary legatee and devisee.

Then, after the death of the wife, the particular realty in question, of which the testator's intention was that his widow should enjoy during her life the complete usufructuary enjoyment, without being obliged to render an account to any person whomsoever, is devised in fee simple to one of his daughters. The fact that the testator's widow died in his life time, and that he thereupon made a codicil to his will, providing that the devisees in fee in remainder should immediately upon testator's death enter into possession of the estates by the will devised to them after the death of the testator's wife, can make no difference in the determination of the question before us. Then, by the codicil made after the death of testator's daughter *Laura*, to whom the fee simple estate in remainder

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after the death of the testator's wife, in the tenement and dwelling house in question, was by the will devised, the use, usufruct and enjoyment of that tenement and dwelling-house was devised to *William Harrington*, husband of testator's daughter *Laura*, for the term of his natural life, and after his death the same was devised *en pleine propriéte* to the four children issue of his marriage with testator's daughter *Laura* and to the survivors of them, in equal proportions. And by this codicil *William Harrington* had as full use, usufruct and enjoyment of the property in question for the term of his natural life as the testator's widow, if she had survived him, would have had.

In view of the whole will, whereby it is apparent that the testator was making provision for his wife and his children, and their issue, equally out of his estate, after the whole of his debts being first paid out of the personalty and so much of his realty as was not specifically bequeathed, I am of opinion that the testator has, by his will, expressed a manifest intention that his mortgage debts as well as his other debts should be paid out of his personal estate devised to his executors, and out of the fund created by the sale of such testator's real estate over which special power, for the purpose of administration, was given to his executors, which power could only be exercised if the personalty should prove to be insufficient, and that the mortgaged estate should not be primarily liable for the debts charged upon them. A contrary decision would, in my opinion, defeat the plain intention of the testator, as appearing in his will.

The appeal, therefore, should be allowed with costs, and the judgment rendered by the Superior Court of the Province of *Quebec* should be reversed with costs.

Appeal allowed with costs.

Solicitors for appellants: *Doutre & Joseph.*

Solicitors for respondent; *Robertson & Fleet.*