1886
Mar. 9, 11 & 12.
*June 22.

THOMAS H. D. JONES, (Opposant for payment in the Superior Court.) APPELLANT;

AND

WILLIAM FRASER, (Plaintiff contesting opposition in the Superior Court)..... RESPONDENT.

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

Will, construction of—Legacy—Alienation of property bequeathed by testator, effect of—Partition—Estoppel—Cross appeal.

W. F. by his will bearing date 11th February, 1833, *inter alia* devised to M. his daughter by an Indian woman and to E. and M. his daughters by another woman, a defined portion of the seigniories of Temiscouata and Madawaska, and the balance of said property to his sons W. and E. A short time after making his will, the testator, who was heavily in debt, received an unexpected offer of £15,000 for the said seigniories, and he therefore sold at once, paid his most pressing debts, amounting to £5,400, and the balance of £9,600 was invested by loaning it on security of real estate.

At his death, his estate appearing to be vacant as regards the £9,600, a curator was appointed.

On the 27th September, 1839, the parties entitled under the will proceeded to divide and apportion their legacies, basing their calculations upon the approximate area of the seigniories devised, and received the collected part of the sums allotted to each by the partition.

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

1886

JONES
v.
FRASER.

In an action brought by W. F. the respondent, who was residuary legatee, against the curator in order to make him render an account, the court ordered the curator to render an account, which he did, and he deposited $50,000 and other securities. On a report of distribution being made, W. F., (the respondent) filed an opposition claiming his share under the will. This opposition was contested by J., the appellant, on the grounds: 1st that the legacies were revoked, and that in his capacity of universal legatee to his mother, (the legitimate child, he alleged, of the testator and the Indian woman who was *commune en biens* with the testator) he was entitled to one-half of the proceeds of the said £9,600; and 2nd, that in the event of his claim to legitimacy and revocation of the legacy being rejected, as by the will the daughters were exempt from the payment of the debts, he should, as representing one of the daughters, be entitled to her proportion of £15,000, the net proceeds of the sale.

Held, affirming the judgment of the court below, that J. (the appellant), not having at the death of his mother repudiated the *partage* to which she was a party, but on the contrary having ratified it and acted under it, was estopped from claiming anything more than what was allotted to his mother.

Per Strong, Fournier and Taschereau JJ.—That under the law prior to the Code the sale of the seigniories which were the subject of the legacy in question in this cause, had not, considering the circumstances under which it was made, the effect of defeating the legacy.

Semble, per Henry J.—That there was a revocation of the legacy.

The judgment of the court below held that as the testator declared that the daughters should not be liable for the payment of his debts, partition, as regards them, should be made of the sum of £15,000, the price obtained from the sale of the seigniories bequeathed, and not of the £9,600 remaining in his succession at his death.

On cross appeal to the Supreme Court of Canada,

Held, that on the pleadings before the court no adjudication could be made as to the sum of £5,400 paid by the curator for the debts, and that in the distribution of the moneys in court all that J., (the appellant) could claim to be collocated for, was the unpaid balance (if any) of his mother's share in the moneys, securities, interest, and profit of the said sum of £9,600 in accordance with the partage of the 27th September, 1839.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment of the Superior Court sitting at Quebec.

1886

JONES v. FRASER.

Ritchie C.J.

The facts and pleadings are fully stated in the report of the case in Volume 12 Quebec Law Reports, 327.

Pouliot for the appellant and respondent on cross appeal. *Irvine* Q. C. and *Casgrain* for respondent and appellant on cross appeal.

SIR W. J. RITCHIE C. J.—I have had an opportunity, through the kindness of Mr. Justice Taschereau, of perusing the judgment which he has written in this case, and I entirely concur in the conclusion at which he has arrived.

There are two points on which I do not think it necessary to express any opinion, one as to the validity of the marriage as affecting the legitimacy of the plaintiff's mother, the other, as to the alleged revocation in the will. Mr. Justice Taschereau has made it clear that it does not lie in the mouth of the appellant to raise these questions. If I had thought it necessary to decide them I should have desired to give them further consideration.

STRONG J.—I also concur in the opinion of Mr. Justice Taschereau, and make the same reservations as His Lordship the Chief Justice. As regards the question of the validity of the marriage that, it seems to me, does not arise, and I do not feel called upon to give an opinion concerning it.

There is another point which does seem to enter into the case to some extent, and to call for an expression of opinion, and that is the question of the revocation in the will. I think there was no revocation of this legacy, but I agree with Mr. Justice Taschereau, that the parties so dealt with each other, in respect to conflicting claims, and with respect to the money under this will, that to apply an English phrase to French law, they have estopped themselves from raising this question.

1886

JONES v. FRASER.

Fournier J.

FOURNIER J.—I concur in the judgment of Mr. Justice Taschereau, with the same reservation as regards the legitimacy of the plaintiff's mother as expressed by His Lordship the Chief Justice.

HENRY J.—I also concur in the judgment of Mr. Justice Taschereau, with the same reservations. I would be inclined to hold that there was a revocation of the legacy, but as the parties, for thirty or forty years have adopted it, and also because, if the will is not sustained the property would revert to the Crown, I am of opinion for the reasons expressed in the judgment of my brother Taschereau, that the parties are too late now in asking to have it set aside. The other questions, that of *res judicata* and others, I have not thought it necessary to consider.

TASCHEREAU J.—This case presents no difficulty.

The appellant Jones bases his claim to a share of the monies now in court upon the legitimacy of Margaret Fraser, his mother, and upon the revocation of the legacy of the seigniories of Temiscouata and Madawaska by the sale thereof made by Fraser subsequently to his will.

It would obviously be useless for him to succeed on the question of legitimacy, (except as to his grandmother's share as *commune en biens*, which I leave aside for a moment), if he failed on his contention that this legacy was revoked, for, if the legacy stands, all of these monies unquestionably go to the legatees. On the other hand, he would not, in any way, benefit by a judgment declaring the legacy revoked, if he failed on the question of legitimacy, for, in that case, all of these monies would escheat to the Crown.

Under these circumstances I think it proper to consider first the question of the revocation of the legacy.

According to the law then in force, if this sale of these seigniories was made by Fraser, *necessitate urgente*, it did not carry revocation of the legacy. The question

1886

JONES v. FRASER.

Taschereau J.

then resumes itself into a simple one of fact, which, as such, has been found against the appellant by Chief Justice Meredith and the five judges of the Court of Appeal. Upon him therefore rested the onus of establishing that such a finding was clearly erroneous. He has, in my opinion, failed to do so. The disposal Fraser made of these monies is, to my mind, strong evidence that it was as representing these seigniories and, as it were, in exchange and in subrogation of them that he thereafter held these mortgages, and as it was then clear law, that where a testator exchanged a property that he had previously bequeathed by his will, even not *ex necessitate*, the legacy was not revoked but the property received in exchange passed ex- the legatee (1). We must hold that here likewise, these monies passed to the legatees as the seigniories would themselves have passed under the will. But, were it otherwise, can the appellant now be admitted to plead the revocation of this legacy? Is he not debarred by his own conduct from the right to now assail it? Let us see in what position he stands.

At Fraser's death, 49 years ago, Margaret, the appellant's mother, accepted the legacy in question, thereby repudiating the said Fraser's succession. Art. 300, Coutume de Paris; art. 712, C.C; *Richer* v. *Voyer* (2). Subsequently by her own will, she instituted the appellant her universal legatee and, as such, he is now her sole legal representative. How could he, under these circumstances, get over his mother's repudiation of her father's succession? Arts. 654, 866 C. C. Compar. Demolombe (3); Laurent (4). But supposing he could get over that difficulty, how could he get over his own acceptance of his grandfather's legacy?

When his mother died, 25 years ago, he might have

(1) 2 Bourjon, 399; 5 Saintespès-Lescot, 110; Merlin Vo. Subrogat. de choses.

(2) 5 Rev. leg. 591.

(3) Vol. 14, Nos. 513 *et seq.* and Vol. 22, Nos. 594 *et seq.*

(4) Vol. 14 p. 593.

refused the said legacy and treated it as lapsed. But what did he do then and since? Did he ever renounce it? Certainly not; but, on the contrary, has accepted it, and has received as such legatee, and in virtue of his grandfather's will, all he could get of the sums included in his mother's lot by the deed of 1839, and besides this, as her universal legatee, all the interests that remained unpaid at her death. He now holds and detains these sums. And yet, when the respondent claims his share of this very same legacy he, the appellant, retorts to him that it has been revoked. But, if not revoked, if good for the appellant, why also not revoked and good for the respondent? Could the appellant so first pocket his share of it and then impeach its validity? I do not think so, and his conduct, as I view it, is against the position he now takes, a *fin de non recevoir*, an estoppel, which it would have been no easy matter for him to overcome, had he been otherwise successful on this part of the case.

And there is another remarkable instance where he again clearly did not treat this legacy as revoked. I allude to his petition upon which he obtained from the Crown the abandonment of all claim to these monies, on the ground that this legacy stood unrevoked. Would he now say that he misinformed the Crown, or that he obtained that abandonment fraudulently? Would he say that it is fraudulently that he got all the monies he has received as legatee, or that it is fraudulently that he holds them?

I am of opinion that this legacy must be considered as not revoked, and that the monies in question consequently passed in the same manner and proportions as the seigniories would themselves have passed under the will. It is therefore unnecessary for me to determine hypothetically who would be entitled to these monies, had there been no legacy. I deem it

1886

JONES v. FRASER.

Taschereau J.

only proper to add, however, that if I therefore do not enter into the question of legitimacy, the appellant must not infer from my silence on this point, that I have any doubt upon the correctness of the judgment of the Court of Queen's Bench thereupon.

The question of *res judicata* it is also needless for me to determine. I may say, however, that I have not so far heard or read anything in the case which makes it at all doubtful in my mind, 1st, that the principal allegation of Fraser's declaration was that this legacy was not revoked, and that the primary object of his action was to have it so declared; 2nd, that Jones by his *défense en fait* and other pleas asked for the dismissal of that action on the ground that the legacy was revoked, and 3rd that the Chief Justice determined that it was not revoked. And I have failed to appreciate the soundness of the reasoning, which would give to any court, in face of that judgment, the right, now or ever, to dismiss Fraser's said action and authorize the curator to re-pocket the monies in question. Neither do I understand, as I read the Chief Justice's judgment, that he reserved to himself or to any one else the power to do so.

Now, on Jones' opposition, if the issue, the principal issue as raised by Fraser's plea, is not again the revocation or non-revocation of that legacy, I have failed to understand the case. For, as I have shown, how can Jones claim any of these monies as part of his grandfather's *intestate* succession, without first establishing that they fell into that succession, or in other words, that they were not bequeathed by the will? Bonnier (1); Boitard (2); Demolombe (3); *Shaw* v. *St. Louis* (4); Delvincourt (5); *Re Billon* (6); *Re Lambin* (7).

As to the partage of 1839, there is no doubt that it

(1) Nos. 299, 862.
(2) 2 Vol. 203.
(3) 30 Vol. 287, 291.
(4) 8 Can. S. C. R. 385.
(5) 71, 1, 100.
(6) S. V. 73, 1, 292.
(7) S. V. 76, 1, 448.

did not then bind the appellant and that he had a perfect right to repudiate it at his mother's death. But it is now clearly too late for him to do so. Demolombe (1); Solon, Nullites (2); Binet 11th, Nullites (3).

Not only did he not repudiate it then, but he unequivocally ratified it by claiming and receiving the capital sums put in his mother's lot by that deed. Only one of these sums besides those received from the curator himself is clearly in evidence, on the part of the record printed upon this appeal (£150 from Vincent Dube) but that is sufficient. There really was no *partage* at all necessary at Fraser's death, for in a case like this, where *créances* compose a succession, the law divides them between the heirs or legatees according to their shares in the estate. Art. 1122 C. C. (4); Demolombe (5); 11 Duranton, (6); Pothier, Obligations (7).

If, here, for instance, these seignories were 18 leagues in front, the three daughters being given six leagues, they were entitled to one third of each and every one of the capital sums due to Fraser at his death, this one-third being sub-divided between them in equal parts. They however agreed to divide them otherwise, the appellant has acquiesced in it, and he is now debarred from complaining of it. Did he ever at any time during the 25 years that his mother is dead, ask for another *partage*? Or has he ever ignored his mother's doings and relied on the division that the law made of these sums? Never. He has on the contrary acted under and taken advantage of the division then made. He had no right whatsoever to receive, for instance, the £150, due by Vincent Dubé, I have alluded to, if not for that deed of 1839. By the will alone, it was only a small portion of that sum that he was in law

(1) 691, 694.
(2) 2, Nos. 407, 447.
(3) 1 Vol. 234 Seq.
(4) Oblig. Nos. 299, 317.
(5) 26 Vol. Nos. 541 & Seq.
(6) Nos. 269, 274.
(7) Nos. 299, 317.

1886

JONES v. FRASER.

Taschereau J.

entitled to. And what is the acquittance he gave to the Curator in 1873, for, if not for his share under that partage? But, says he, I gave that acquittance under reserve of all my rights. That is so. But reservations of that kind are of no avail. *Facta potentiora sunt verbis, et actus protestationis contrarius tollit protestationem* (1).

As to the community of property between Fraser and the Indian woman, had they been legally married, it would undoubtedly have entitled Margaret Fraser to one-fourth of these £9600. But here again, the deed of 1839, which stands in full force and effect, would preclude her from the right to claim any more than what was thereby allotted to her and accepted by her as her share of these £9600. And the appellant, I repeat it, stands in her shoes, is bound by her acts, and has moreover unequivocally ratified that deed.

As to the contention that the six leagues bequeathed to the daughters were worth more than the rest of the seigniories, it is not proved. The evidence is altogether against it. But were it otherwise here again the appellant is met by the deed of 1839, as his mother's representation, and by his own acts of acquiescence in that deed.

There remains the claim made by Jones in relation to the sum of £5,400 paid by the late Fraser himself in settlement of his debts out of the proceeds of the sale of these seigniories. Jones contends that as by the said Fraser's will, his mother's shares was to be free from the payment of all debts, he is entitled to receive from the estate a share of this sum of £5,400. Mr. Irvine has argued with great force on Fraser's part, as cross appellant, that Jones' contention is unfounded, that, by the express words of the will, it was the debts the testator would leave at his death, that the daughters were exempted from; that the debts he himself

(1). Solon, 2 des Null. 436.

paid were not debts of his estate, and not covered by that clause of the will: that the will speaks from the death, and must be read as bequeathing to his daughters one-third of the £9,600, with exemption from his debts left at his death. In support of this contention may be cited a passage in Montvallon, des Successions (1), where it is said that if a testator pays debts which by his will he had obliged one of his legatee to pay, he is presumed to have discharged the legatee of the obligation to pay them. Moreover, I do not think that the merit of this part of Jones' claim can be determined in this case, and the cross-appeal on this point, as well as on the partition of 1839, should be allowed That amount of £5,460 was not included in the plaintiff's action, never was in the the curator's hands, and is not included in Chief Justice Meredith's judgment. It is not then in court, and does not form part of the monies now in question. We decide whether or not, and to what extent, Jones is entitled to the £9,600 deposited by the curator, and that ends the case. His claim as to to the £5,400 comes in this case in the nature of an opposition *en sous-ordre* which has no *raison d'être* here. We, therefore, express no opinion on this part of Jones' claim, and leave him to exercise whatever rights he may have in relation thereto, if any, by direct action or otherwise as he may think fit.

The appeal should be allowed without costs, the cross-appeal allowed with costs, and Jones' opposition dismissed with costs, except as to any part of the monies and securities, interest and profit which may still be due to him in virtue of the partition of 1839, in accordance with the partage of the monies in question are to be distributed, if any, for which he must then be collocated.

The parties may perhaps agree as to what is the

(1) Page 558.

1886

JONES v. FRASER.

Taschereau J.

amount of the sum thus remaining due to Jones. Failing such understanding, we will see how to get it established, so as, if possible, to get it to form part of the judgment of this court, before the minutes are settled.

GWYNNE J.—In this case I concur in the judgment of my brother Taschereau—that the appeal be dismissed and the cross-appeal allowed with costs.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for appellant: *Tessier & Pouliot.*

Solicitors for respondent: *Larue, Angers & Casgrain.*