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In the Privy Council.

No. 67 of 1896.

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

BETWEEN

DAME CHARLOTTE DE HERTEL, *es qual.* . . *Appellant,*

AND

DAME EMILY C. GODDARD *et al., es qual.* . . *Respondents.*

ADDITIONAL PAPER.

[Report of the Reasons for Judgment of Archibald, J., in *de Hertel* v. *Roe*, in the Superior Court, R.J.Q., 6 C.S. 101; this Judgment is printed without the Reasons at page 51, line 30 of the Record.]

Superior Court.

Montreal, June 8, 1894.

Coram ARCHIBALD, J.

In the matter of the Cadastre of the Seigniory De Lery.

Dame Charlotte De Hertel, opposant, and Alfred E. Roe, intervening, contestant.

10 ARCHIBALD, J.:—

This case comes up under Article 5510 of the Revised Statutes of Quebec, upon an opposition, claiming on behalf of the opposant, the one-sixth of all and every the seigniorial rights to the seigniory of deLery.

The case arises out of the interpretation to be given to a clause of the will of the late William Plenderleath Christie, which clause is as follows:—

" I give, devise and bequeath, to the said Catherine Robertson, of Montreal, widow, during her natural life, and after her death to her daughters, Mary and Amelia Robertson, and to her niece Mary Elizabeth Tunstall, conjointly and in equal shares, to be enjoyed by them during their natural life, and after their decease, to their children, respectively, born in lawful wedlock, in full
20 and entire property, share and share alike, all and every the tract and parcel of land called and known as the Seigniory deLery, situated and being in the said province, etc.

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"And I desire, if two of the three persons—Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall—shall die without such children, that the said tract, part or parcel of land, etc., shall go and belong to the child or children of the survivor in full and entire property, and if all three, the said Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall, shall die without such child or children, the said tract, part or parcel of land, etc., shall go to (certain benevolent societies)."

The testator died, and after his death Catherine Robertson received the said property and enjoyed it. At her death Mary and Amelia Robertson and Mary Elizabeth Tunstall were all alive and entered into possession conjointly of the said property, and continued such possession until the death of Mary Robertson, 10 who died without children.

After the death of Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall continued to enjoy the whole property until the death of Amelia Robertson, who also died without children.

Mary Elizabeth Tunstall married one Roe, who had issue, Alfred E. Roe, who intervenes in the present opposition, claiming that the whole property belongs to him.

The contention of the opposant is that upon the death of William Plenderleath Christie, Catherine Robertson became institute, under the substitution created by the will, and that upon her death Mary and Amelia Robertson and 20 Mary Elizabeth Tunstall were substitutes in the first degree; that upon the death of Mary Robertson, the two remaining, namely, Amelia Robertson and Mary Elizabeth Tunstall, became substitutes of the share of Mary Robertson in the second degree, and that by law, as far as regards the share of Mary Robertson thus passing in the second degree to Amelia Robertson and Mary Elizabeth Tunstall, the substitution could not be further continued, and that Amelia Robertson so became full proprietor of one half of the share of Mary Robertson, which half the opposant is entitled to as universal legatee under the will of Amelia Robertson.

The intervening party contends, on the other hand, that the possession of 30 Mary Robertson's share of the property by Amelia Robertson and Mary Elizabeth Tunstall did not constitute a degree in the substitution, and that under the will the second degree in the substitution was only reached when the property was to be delivered to the child or children of the survivor of the three above mentioned. The intervening party contends also that by the Act of 1801 relating to the freedom of willing, all prohibitions relating to the number of degrees to which the substitution of property may be legally carried by the testator were done away with, and that the law of the code in that matter was not then in force; that the will of Christie was made in the time intervening between the statute in question and the code, and was governed by the law of that period, and even although the 40 intervening party might be considered beyond the degree now permitted in substitutions, nevertheless the will must be carried out in its entirety, because the prohibition now in force did not then apply.

If this contention is well founded it disposes of the case, and it is therefore proper to consider it before the other questions.

The statute in question, namely, 41 George III., ch. 4, sect. 1, which governs the matter, is as follows:—

"Whereas, by Act of the fourteenth year of His Majesty's reign, entitled 'An Act for making more effectual provision for the government of the province of Quebec in North America,' it is enacted that every owner of lands, goods or credits in the said province who has a right to alien the said lands, goods or credits in his or her lifetime by deed of sale, gift or otherwise, may devise or bequeath the same at his or her death by his or her last will and testament, any law, usage or custom heretofore or now prevailing in the said province to the contrary hereof in anywise, notwithstanding; such will being executed either according to the laws of Canada or according to the forms prescribed by the laws of England. And whereas, doubts and difficulties have arisen in this province touching the true intent and meaning of said Act in this respect; be it therefore 10 enacted by the King's most excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Lower Canada, constituted an assembly by virtue of and under the authority of an Act passed in the Parliament of Great Britain entitled, 'An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, entitled: An Act for making more effectual provision for the government of the province of Quebec in North America, and to make further provision for the government of the said province.' And it is hereby enacted by the authority of the same, that it shall and may be lawful for all and every person or persons of sound intellect and of age, having the legal exercise of their rights, to devise or bequeath by last will and testament, whether the same be made by a husband or wife in favour of each other or in favour of one or more of their children, as they may see meet, or in favour of any 20 other person or persons whatsoever, all and every his or her lands, goods or credits, whatever be the tenure of said lands, whether they be *propres, acquets* or *conquets*, without reserve, restriction or limitation whatsoever, any law, usage or custom to the contrary hereof, in anywise, notwithstanding; provided always that it shall not be lawful for a husband and a wife, making such last will and testament, to devise and bequeath more than his or her part or share of their community or other property and estate which he or she may hold, or thereby to prejudice the rights of the survivor or customary or settled dower of the children, provided also that the said right of devising as above specified and declared shall not be construed to extend to a devise by will or testament in favour of any corporation or any person in *main morte*, unless the said person or corporation be by law entitled to accept thereof."

30 Now, it is contended that this statute has made willing, absolutely free and removes any limitation which previously existed with regard thereto, as well relating to property which could be willed as to the number of degrees of substitution which the testator might wish to impose.

The interpretation given to this statute by the intervening party appears to have been that given by the Codification Commissioners, as appears by their fifth report, under Article 186 which is as follows:—

" Substitution may be created for a limited time or in perpetuity, all restric-
" tion as to the number of degrees has been abolished by the introduction of full
" liberty in the disposal of property by will."

40 And on page 191 the Commissioners remark concerning the same matter as follows:—

"Article 186 solves in the affirmative, as has already been stated, the
" question of legality of perpetual substitutions. Doubts have existed and may
" still exist, but they appear to be gradually disappearing. The purely English
" origin of our absolute freedom in the matter of wills and the existence in
" England of the right to create substitutions in perpetuity have led the commis-
" sioners to think, although not without some uncertainty and without presuming
" to express any opinion upon questions relating to the past, that the limitation
" to three successive recipients established by the ancient law has been
50 " abolished."

The artice 18 6 suggested by the commissioners failed to meet the approval of the Legislature, and article 932 was passed in place of it, which limits substitutions to three recipients.

The opinion of the codifiers as just above cited was drawn into question in the case of *Jones & Cuthbert*, reported in the Montreal Law Reports, 2 Q.B., p. 44 and following, but no decision was given upon the question. In the case of *Blanchet & Blanchet* reported in 11 L.C.R., p. 204, speaking of the effect of the statutes of 1774 and 1801, Chief Justice Lafontaine said:—

" Les réserves et les incapacités de recueillir, ne portaient que sur les biens, " ou plutôt sur le pouvoir d'en disposer ou de les acquérir. Les unes disparaissant " pour ainsi dire en entier, et toutes les autres disparaissant à peu d'exceptions " près, l'on peut conclure, comme je l'ai dit, dans la cause de *Quintin & Girard*, " que le statut de 1801 proclamait la liberté illimitée de tester. Mais il ne s'ensuit 10 " pas qu'un testateur, tout en exerçant cette liberté de tester de tous ses biens, " puisse méconnaître et réduire au néant des lois d'ordre public, des droits que " ces mêmes lois ont consacrés indépendamment de sa volonté, et qu'il faut " respecter, droits qui subsistent d'eux-mêmes par la loi commune, et qui, " éventuellement, puevent être reconnus, et peuvent assurer à l'héritier du sang, la " propriété des biens de la succession du testateur, nonobstant le testament que " l'on représente de la part de ce dernier. Il ne s'ensuit pas, non plus, qu'en " disposant de tous ses biens, il puisse le faire de manière à leur donner une " destination que des lois positives défendent de leur donner."

In passing the statute of 1801, it is said that the English system of freedom 20 of willing was transferred to this province. In truth, I do not think that it was ever intended by that statute to create a greater freedom in the matter of willing in the Province of Quebec than existed previously either in France or in England. If we look at " Jarman on Wills," fourth edition, vol. 1, p. 250, we find that he there states that the policy of the law is against perpetuity. On page 251, Jarman remarks as follows:—

" The early judges had an extreme repugnance to every disposition of " property that savoured of a perpetuity, but the expressions which occasionally " fell from them demonstrative of this feeling did not afford a specific denounce- " ment of the monster which the law was stated to abhor; the effect, however, 30 " was to throw such a general suspicion over all executory limitations as to " render the validity of every gift of this nature questionable until it had been " the subject of adjudication. The *onus probandi* (so to speak) was regarded as " lying on those who had to sustain the future gift, and the course which the " decisions have taken has been to affirm the validity of one executory disposition " after another until the rule has settled down to an analogy of the ordinary " limitations in strict settlement. That is, to the allowance of a life or any " number of lives in being, and twenty-one years afterwards."

Bailie, B., after an elaborate examination of authorities, declared the unanimous opinion of the judges to be that the true limit of the rule against 40 perpetuities was a life or lives in being and twenty-one years without reference to the infancy of any person whatever.

And on page 254 Jarman says:—

" A gift the vesting of which is postponed for twenty-one years and a day is " void."

It is admitted on all hands that our law previous to the statutes of 1774 and 1801, as derived from France, prohibited substitutions beyond the degrees now

allowed by our code. It then remains to consider whether indeed the statute of 1801 can have the effect which is claimed for it. Dwarris on Statutes, page 694, lays down the following rules for the interpretation of statutes, which, he states, were those adopted by the Barons of the Exchequer in *Haydon's* case, namely:—

"For the sure and true interpretation of all statutes in general, be they "penal, beneficial or restrictive, or an enlargement of the common law, four "things are to be discerned and considered. First, what was the common law "before the making of the Act? Second, what was the mischief and effect 10 "against which the common law did not provide? Third, what remedy has the "Parliament resolved and appointed to cure the disease of the commonwealth? "Fourth, the true reason of the remedy."

Dwarris then remarks:—

"First in importance, according to these able and experienced judges, is the "consideration of what was the rule of the common law, to know what the "common law was before the making of the statute, whereby it may be seen "whether the statute be introductory of a new law or one affirmative of the "common law, the very lock and key to set open the windows of the statute. "Further, as a rule, in exposition, statutes will be construed in reference to the 20 "principles of the common law, for it is not to be presumed that the Legislature "intended to make any innovation upon the common law further than the case "actually required. The law will infer that the Act did not intend to make any "other alteration than what is specified, and besides what has been plainly "pronounced; for if the Parliament had had that design, it is naturally said they "would have expressed it."

Again:—

"The best interpretation of a statute is to construe it as near to the rule "and reason of the common law as it may be, and by the course that that "observes in other cases."

30 The common law to which we must refer in this instance is that which we have received from France, and there is clearly no doubt as to what that was previous to the statute in question. Also, as I have above pointed out, there is as little doubt that perpetual devises were as illegal in England as they were so in France. If we consider then the language of the statute in question as above cited, we must, I think, come to the conclusion that it does not expressly, at any rate, alter this rule of the common law against perpetual substitutions. It speaks only of the absolute freedom of willing as regards the property itself and the persons to whom it can be willed. It does not by any necessary or even probable inference affect the right of a man to will his property to a person not 40 existing at all. Indeed, it may be inferred that it would expressly prohibit such willing, inasmuch as it prohibits willing to corporations which have not the power of accepting.

Looking at the question from another point of view, we will come, I think, to exactly the same conclusion. What was the occasion of the passing of the statute of 1801? The statute of 1774 established complete liberty of willing, so far as the testator was concerned, but appeared to be silent with regard to the persons who could accept. In our own law, there were certain reservations to

the profit of the blood heirs. There were also incapacities of receiving by which certain persons were affected; thus four-fifths of the *propres* were so reserved. The statute of 1774 abolished this reservation. Thus Chief Justice Lafontaine said in the case of *Quintin* above cited:

" On a pensé que l'acte de 1774 n'avait eu d'autre effet que de donner à la " faculté de disposer par testament la même étendue qu'avait celle de disposer par " acte entre vifs : c'est-à-dire qu' à l'avenir un testateur pouvait léguer tous ses " meubles et héritages *propres*, acquêts et conquêts à une personne capable."

Again:—

" Le statut de 1774 n'avait donc pas fait disparaître toutes les *réserves ;* il en 10 " laissait subsister, entre autres, celle de la *légitime.* Il n'avait pas, non plus, " touché aux incapacités de recueillir pré-existantes; il les laissait toutes " subsister. Si, dorénavant, un individu pouvait disposer par testament de la " totalité de ses propres, il ne devait le faire, qu'au profit de personnes capables. " Dans cet état de choses, le statut provincial de 1801 fut promulgué: d'un côté, " il avait pour objet d'abolir les réserves qui pouvaient encore exister, et, par cela " même, de donner au testateur une liberté illimitée de tester, c'est-à-dire, de " disposer de tous ses biens. De l'autre côté, le statut avait pour objet de faire " disparaître, en quelque sorte, presque toutes les incapacités de recueillir pré- " existantes." 20

That this was the reason why the statute was enacted is plain from the preamble of the statute where it mentions that doubts have been raised as to the power of the testator under the statute of 1774 to will all his property of every description, and it is stated in express terms that the statute of 1801 is intended to settle those doubts, and its language is such as to accomplish that result and that result only. The language of the Act is in accordance with the purpose of the Act, and I am clearly of opinion that it must not be interpreted in any way as affecting the question of degrees of substitution.

The report of the codifiers must be treated as a mere opinion without authority, and one dubiously expressed, and which we cannot now follow. 30

I, therefore, decide this question in favour of the opposant, namely, that the law restricting substitutions to two degrees beyond the institute must be held to be binding and apply.

It was suggested at the argument that this will, properly interpreted, did not create a substitution at all, but only a series of usufructs. I cannot adopt this view. Under our law property must always have an owner. " *Le mort saisit le vif.*" That is to say, that upon the death of any person some other person must be immediately seized of the property which he leaves. Where a testator makes such provision in a will as clearly to indicate a delay after his decease before some other person shall become proprietor of his estate, there is 40 then a substitution, that is to say, that some person must, in the meantime, become proprietor under the obligation of restoring the property, either at his death or at some other fixed time, to a subsequent owner. In the present instance the will says in express terms that at the death of the testator the property is to go to Catherine Robertson, and at her death it is to go to her two daughters, Mary and Amelia, and to her niece, Mary Elizabeth Tunstall. It is clear that the testator did not intend that these latter should become proprietors

at his death. The words of the will are not susceptible of that interpretation. There is then a substitution. Catherine Robertson is the institute, Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall are the first substitutes.

The question then arises—Who became proprietor of the one-third share belonging Mary Robertson after her death? She had no children, otherwise it would have gone immediately to them. It must find a proprietor somewhere. The will is absolutely silent. It says only this: "If two of the three die "without children, then the whole property shall go to the children of the "third, if any." It is clear that the property could not go to the children of the third until at least two were dead. Who then became proprietor of Mary's share? We have here to complete the will by intendment. According to the Roman law, it would seem that substitutions were more favoured with them than with us. In Thévenot d'Essaulle's Treatise on Substitutions, annotated by Judge Mathieu at No. 353, we find:—

"It is nevertheless certain that under the Roman law, presumptions were "sufficient to create a gradual substitution."

But at No. 356 the same writer says that since the ordinance of substitutions, the proof in France had to be positive and absolute. At No. 358 he says:—

"It is, nevertheless, not necessary since the ordinance that the graduality "should be expressed; it is sufficient if it expresses tacitly and indubitably the "terms of the disposition."

Under No. 362 he gives an example:—

"I will a property to Peter and James, and I charge the survivor of the two "to restore the property to Antoine."

That is a gradual substitution tacit and necessary in effect. The survivor of the two being charged to restore the property entire to Antoine, it follows of necessity that the portion of Peter, if he dies the first, shall accrue to James, in order that the latter may restore it entire to Antoine. The same thing would happen if it was James who dies first.

Now, this example comes very close to the case which we have before us. The testator, in this instance, has practically charged the three persons, Mary and Amelia Robertson and Mary Elizabeth Tunstall, to restore the property in question to their children, if any they have, and if two of the three die, then the property is to go to the children of the third. In the present instance, the three in question have the right to enjoyment during their lives; the property is to be restored entire to the children of the one or the other who may have children. It follows under the example above given that in order to make the restoration, the property of the first dying shall go to the others, and so also of the second, provided the second also has no children, as has happened in this case. Then, if this be correct, it follows that upon the death of Mary Robertson, the property of her share went to Amelia Robertson and Mary Elizabeth Tunstall, to be by them remitted to the children of any one who should have children, or if none of them had children, to other persons named.

The question then is, must Amelia Robertson and Mary Elizabeth Tunstall be reckoned the second and final degree in the substitution created under Christie's will, so far as regards the share of Mary Robertson.

It is scarcely open for me to discuss this question, inasmuch as it has been already decided in the case above cited of *Jones & Cuthbert* by the Court of Appeal. There the holding was:—

" Degrees of substitutions are counted by heads and not by roots; when the
" share of one amongst several who took conjointly passes to the others by his
" death, such transmission is reckoned an additional degree as regards the share
" so transmitted."

This being the case, Amelia Robertson became indefeasible proprietor of one-half of the share of Mary Robertson, that is to say, of one-sixth of the seigniory, and could and did transmit that sixth part by will to the opposant. There seems no escape from this conclusion, if the doctrine of the case just above cited be correct, except to suppose that at the death of Mary Robertson, the child or children of Mary Elizabeth Tunstall became immediate proprietor in some sort 10 of conditional way of the property of the succession of Mary Robertson. But I cannot reconcile this supposition with the formal tenets of the law relating to substitutions. If that was the case, even although the present intervenant had died before the death of the previous substitutes, he would have conveyed the property to his heirs. This, I think, is directly contrary to the provisions of the will, because the testator says:—

" If all three, said Mary Robertson, Amelia Robertson, Mary Elizabeth
" Tunstall, shall die without such child or children, the tract or parcel of land,
" &c., shall go to (other persons named)."

It will be noted that not a part or a portion, but the whole shall in such 20 event go to such other persons. It is clear then that the intention of the testator was to exclude the right of any child or children of any of the three persons unless such child or children survive their parents, so that even although the present intervenant was alive when Mary Robertson died, he could not have succeeded to any portion of the property unless he also survived his own mother. It is clear then that no property in the share of Mary Robertson could vest in the present intervenant at the date of the death of Mary Robertson, that is to say, that the substitution, so far as the intervenant is concerned, was not open nor even partially open by the death of Mary Robertson.

See Thevenot d'Essaule, Treatise on Substitutions, Nos. 483, 486, 487 30 and 577. Here the author is discussing where the property in a conditional substitution rests. At 576 he states that the *grevé* is proprietor during the condition. In 577 he says:—

" The reasons of this are palpable, the substitute before the happening of
" the condition has only a simple hope, as I have previously said: he is only
" called for a future and uncertain event, and he will have no right unless this
" event happens. He cannot then be the proprietor. It being impossible then
" that the substitute should have the property during the condition, it must of
" necessity belong to the *grevé*, because it cannot be in suspense."

If this be the case, there must be a *grevé*, and in the case in question we 40 must hold the *grevés* to be the persons who are by the will to restore the property to the substitute if the conditions arise.

At No. 585, the same author says:—

" It is only after the happening of the condition that the property can pass
" to the substitute."

Holding these views I am obliged to maintain the opposition.

In the Privy Council.

No. 67 of 1896.

On Appeal from the Court of Queen's Benc[h] for Lower Canada, in the Province o[f] Quebec (Appeal Side).

BETWEEN

DAME CHARLOTTE DE HERTEL, *es qual* . . . . . . *Appellant*,

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