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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 67 of 1896.

29470

APPELLANTS' CASE.

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.*

APPELLANT'S CASE.

1. The subject in dispute is an undivided sixth share of what is known as the Seigniorie de Léry.

2. The late William Plenderleath Christie, the owner of the Seigniorie de Léry, made by his will, the following bequest:—

" I give, devise and bequeath to the said Katherine Robertson of Montreal, R. p. 27,
 " widow, during her natural life, and after her decease to her daughters ll. 5-29.
 " 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 and entire property,
 " share and share alike, all and every the tract and parcel of land called
 " and known as the Seigniorie DeLery, situated and being in the said
 " province," . . . "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" . . . " 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"
 " shall be sold and the clear proceeds thereof shall be
 " equally divided among" (certain benevolent societies).

? of all of them
whole
shd

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R. p. 18, 1. 16.

R. p. 43, 1. 2.

R. p. 43, 1.

22.

3. Katherine Robertson survived the testator and died in the year 1858.

Mary Robertson died without children on the 9th October 1876.

Amelia Robertson died also without children on the 8th February 1891.

Mary Elizabeth Tunstall survived them all and at her death left one child, Alfred E. Roe.

R. p. 6,

1. 33 *et seq.*

4. The Appellant is the surviving executrix of the will of the late Amelia Robertson above named, and by her claim or opposition in a proceeding in the Superior Court of Quebec she alleged the will and facts above mentioned, and also set forth; that, upon the death of the testator, William Plenderleath Christie, the property in question passed under the will to Catherine Robertson, who was to and did enjoy it in the first instance; that upon the death of Catherine Robertson, it passed under the will to Mary Robertson, Amelia Robertson, and Mary Elizabeth Tunstall, who were to and did enjoy it conjointly and in equal shares, in the second instance; that upon the death of Mary Robertson, her one-third share passed by necessary intendment under the will, one-half to Amelia Robertson and one-half to Mary Elizabeth Tunstall, each of whom was to and did enjoy that half of one-third in the third instance, and that (the third degree of substitution, the limit of the testator's power to substitute having been thus completed as to the one-half share of Amelia Robertson in the one-third share of Mary Robertson), the said one-half of one-third, being the one-sixth share in question, became the absolute property of Amelia Robertson and, upon her death, passed under her will to the Appellant and her deceased co-executor absolutely. Thereupon the Appellant and her said co-executor prayed to be declared owners of the undivided sixth share in question.

R. pp. 10

& 11.

5. Albert Edward Roe the Respondents' predecessor by his intervention and contestation alleged that Mary Robertson, having died without children, her share of usufruct devolved by accretion to Amelia Robertson and Mary Elizabeth Tunstall; that by the terms of the will in question, on the deaths of Mary Robertson and Amelia Robertson, before that of Mary Elizabeth Tunstall, he (Roe) being the only legitimate child of the latter, became the sole owner of the said Seigniorie. He further denied that Amelia Robertson and Mary Elizabeth Tunstall had become on the death of Mary Robertson, owners of one-third of said Seigniorie, alleging on the contrary, they had only a usufructuary right therein which became extinguished on their death; and he alleged that Amelia Robertson, never having had any right of ownership in any part of the said Seigniorie, was unable to dispose by will of any portion thereof.

He also admitted that the share of Mary Robertson had passed at her death, to the two survivors, Amelia Robertson and Mary Elizabeth Tunstall, asserting however, that this transmission had taken place by way of accretion.

R. p. 18,

1. 21-23.

He also formally admitted the transmission of the share of Mary Robertson upon the death of the latter.

6. In fact the share of Mary Robertson was held and enjoyed after her death by Amelia Robertson and Mary Elizabeth Tunstall in equal shares respectively.

R. pp. 46

& 47.

7. On the 18th of June 1879 after the death of Mary Robertson a deed of agreement and settlement was executed between Amelia Robertson and Mary Elizabeth Tunstall, and Alfred E. Roe whereby the exclusive right of Amelia

Robertson and Mary Elizabeth Tunstall to the entire property in question was fully recognised and conceded; and in a suit by the executors of Amelia Robertson to recover monies payable by Alfred E. Roe under this deed the Court of Queen's Bench confirmed the judgment maintaining the claim and held that there was accretion among the usufructuaries.

8. In the proceeding now in question the Superior Court, Archibald, J., R. p. 4, l. 29. gave the first judgment in Appellant's favour, maintaining her claim to the ownership of the sixth share in question.

9. Upon an inscription for review before three judges, the Superior Court in I. p. 5, l. 10 *et seq.* Review by a majority, reversed the first judgment, and dismissed the Appellant's R. p. 77. claim to the ownership of the sixth share in question; Doherty, J., holding that the rule of law contained in Article 963 of the Civil Code was conclusive of the matter, and that no transmission of the share of Mary Robertson took place at her death in consequence of the opening of the right being suspended by a condition; while Loranger, J., appears to have held that the enjoyment of the property R. p. 84. passed to Amelia Robertson and Mary Elizabeth Tunstall by operation of accretion; Davidson, J., dissenting and agreeing with the reasons given by Archibald, J., who pronounced the first judgment, which held that the question in issue was not determined by Article 963 of the Civil Code.

10. The present Appellant having appealed to the Court of Queen's Bench, R. p. 67, the judgment of the Superior Court in Review was confirmed by the judgment of I. 35 *et seq.* the Court of Queen's Bench; the Chief Justice however intimated that accretion R. p. 87. did not operate.

11. The Appellant humbly submits that the said judgments of the Court of Queen's Bench and of the Superior Court in Review were erroneous and ought to be reversed and the first judgment of the Superior Court restored for, amongst others, the following

REASONS.

30 1. Because the testator, Christie, having given an estate to Mary Robertson, Amelia Robertson, and Mary Elizabeth Tunstall, conjointly and in equal shares, and after their ^{ir} decease to their children respectively share and share alike, and having declared that if two of those three persons should die without such children, the estate should go to and belong to the children of the survivor, manifestly intended and in effect devised that on the death of one of those three persons without children, the share of such one should pass to the two survivors of the three.

40 2. Because under Christie's will, the share of Mary Robertson passed on her death without children to Amelia Robertson and Mary Elizabeth Tunstall.

3. Because substitution cannot by law be created for more than two degrees exclusive of the institute; and where the share of one among several who take conjointly, passes to the others, by his death, such transmission is in respect of such share reckoned as one degree.
4. Because in this case the testator's intention is manifest and should be effectuated; the estate was operated on by the will at every step; and there was no temporary intestacy as is in effect suggested by the Respondents; but on the contrary there was a right of survivorship or of reciprocal 10 substitution as between the three joint takers.
5. Because according to the parties' own agreed interpretation of their rights, acted on and legally settled by themselves, and confirmed by judgments of the Superior Court and of the Court of Queen's Bench, the property in question vested in the survivors on the death of Mary Robertson.
6. Because the continuance by heirs-at-law referred to in Article 963 of the Civil Code, cannot (as the Respondents erroneously contend) have the effect of permitting property to be devised successively to a greater number 20 of persons than is permitted by law.
7. Because Amelia Robertson having been, as the substitute in the second degree, the third taker of one-half of the share of Mary Robertson, was the last person to whom such half of such third share could be devised by the will in question, and thus it vested in her finally and absolutely; and therefore passed under her will to the Appellant.
8. Because the first judgment, namely, the judgment rendered by the Superior Court on the 8th June 1894, is right and 30 should be restored and confirmed.

EDWARD BLAKE.

A. T. CROSS.

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 HER-

TEL, *es qual.* *Appellant,*

AND

DAME EMILY C. GODDARD,

et al., es qual. *Respondents.*

APPELLANT'S CASE.

S. V. BLAKE,

17, Victoria Street, S.W.