35, 1897 29469

In the Privy Council.

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 & AL., ES QUAL., - *Respondents.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

No. of Record.	Description of Document.	Date.	Page in Record.
	In the Court of Queen's Bench.		
1	Inscription in Appeal - - - - - dated	28 June, 1895 - -	2
	In the Superior Court.		
2	Proceedings in the Superior Court - - - from	19 May, 1892 to 10 July, 1895 -	3
2A	Judgment of the Superior Court - - - rendered	8 June, 1894 - -	4
2B	Judgment of the Superior Court sitting in Review rendered	19 June, 1895 - -	5
3	Opposition *afin de Conserver* - - - - dated	10 May, 1892 - -	6
4	Petition for Intervention - - - - dated	2 August, 1892 -	9
5	*Moyens au soutien de l'Intervention* - - - dated	9 September, 1892 -	10
6	Answer to Intervention - - - - - dated	20 September, 1892 -	12
7	Inscription for proof and final hearing - - dated	16 February, 1894 -	14
8	Notice of the death of A. E. Roe, the Intervenant dated	16 February, 1894 -	15
9	Petition *en reprise d'Instance* - - - dated	28 March, 1894 -	16
10	*Re* Inscription for enquête and merits - - dated	24 April, 1894 - -	17
11	Admissions of Parties - - - - - dated	9 May, 1894 - -	18
12	Last Will and Testament of William Plenderleath Christie, Esq. - - - - - - - - dated	31 March, 1845 -	19
	Opposants' Exhibit No. 1 - - - fyled	11 May, 1894 - -	

In the Privy Council.

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., - *Appellants.*

and

DAME EMILY C. GODDARD & AL., ES QUAL., - *Respondents.*

RECORD OF PROCEEDINGS.

TRANSCRIPT of Record and Proceedings in the Courts, of the Province of Quebec, appealed from in a cause between

Dame Charlotte de Hertel, *es qual.* (Opposant) - Appellant;

and

Dame Emily Charlotte Goddard & al., *es qual.* (Intervenants *par reprise d'instance*) - - - - Respondents.

RECORD.

In the Court of Queen's Bench.

Canada, Province of Quebec. } In the Court of Queen's Bench for the Province of Quebec, (Appeal Side.)

Transcript of all the Rules, Orders and Proceedings found in the Record and Register of Her Majesty's Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), in the matter pending of Dame Charlotte de Hertel, *es qual.*, Opposant, and Dame Emily Charlotte Goddard & al., *es qual.*, Intervenant *par reprise d'Instance*, transmitted to the Court of Queen's Bench upon the appeal side thereof, in virtue of an Inscription in appeal fyled by the said Dame Charlotte de Hertel, *es qual.*, and to be transmitted to Her Majesty's Privy Council on the appeal of the said Dame Charlotte de Hertel, *es qual.*

RECORD.

In the Court of Queen's Bench.

No. 1. Inscription in Appeal, dated 28 June, 1895.

DOCUMENT I.

Province of Quebec, Montreal. } In the Court of Queen's Bench. (Appeal Side)

Dame Charlotte de Hertel, of the City of Montreal, widow of the late George E. Fenwick, in her quality of sole surviving executrix of the last will of the late Amelia Robertson, spinster, executed at Montreal before Lighthall and colleague, Notaries, on the 8th October, 1879, and of the Codicil thereto, before said Notaries on the 5th February, 1891. (Opposant in the Superior Court) - - - Appellant.

and

Dame Emily Charlotte Goddard, of the City of Montreal, widow of the late Alfred Edward Roe, as well in her capacity of executrix under the last will of the said Alfred E. Roe, and Codicil thereto, whereof probate was granted by the Prothonotary of the Superior Court at Montreal, on the 16th August, 1893, as in her capacity of tutrix to her minor daughter Florence Roe, issue of her marriage with her said husband, appointed as such by *acte* of tutorship, homologated at Montreal on the 13th September, 1893, and Robert Craik of the same place, doctor in medicine, in his capacity of curator, duly appointed by *acte de curatelle*, homologated at Montreal on the 13th September, 1893, to the substitution created by the last will and testament of the said late Alfred E. Roe. (Intervenants *par reprise d'Instance* in the Superior Court.) - - - - - Respondents.

We appear for the said Dame Charlotte de Hertel who now constitutes herself in her said quality, Appellant, and we hereby inscribe this cause in and for Appeal to the said Court of Queen's Bench, in appeal from the final judgment rendered in and by the Superior Court, sitting in Review, at Montreal, on the nineteenth day of June, instant, dismissing the said Appellant's opposition in the matter of the Cadastre of the Seigniory de Lery, bearing number 1460 of the records of the Superior Court at Montreal, wherein the said Dame Charlotte de Hertel and her husband George E. Fenwick (the latter since deceased) in their quality of joint executors of the said last Will of the said late Amelia Robertson, were Opposants, and the late Alfred Edward Roe above named was Petitioner in Intervention, and the said Respondents Dame Emily Charlotte Goddard and Robert Craik in their above named capacities were Intervenants in continuance of suit. And we hereby give notice that on the second day of July next (1895), at half past ten o'clock in the forenoon, the said now Appellant will give security in the office of and before the Prothonotary of the said Superior Court at the Court House in the City of Montreal to effectually prosecute the said Appeal and pay such costs as may be adjudged as required by law, and to that end will then and there tender as sureties George H. Massy of the Town of Westmount in the District of Montreal, engineer,

In the Court of Queen's Bench.

No. 1. Inscription in Appeal, dated 28 June, 1895. —*continued.*

and James Cunningham of the City of Montreal, book-keeper, of all whereof Mtrs. Lafleur & Macdougall, attorneys for said Respondent are hereby notified.

Montreal, 28th June, 1895.

CROSS & BERNARD,
Attorneys for Appellant.

(On the back.)

Je, soussigné, résidant à Montréal, huissier juré de la Cour du Banc de la Reine en appel du Bas-Canada, exerçant dans le District de Montréal, certifie sous mon serment d'office, que le vingt-neuf de juin courant 1895, entre midi et trois heures de l'après midi, j'ai signifié à Mtrs. Lafleur & Macdougall avocats des intimés ci-devant nommés l'inscription et avis d'autre part, en leur en laissant une vraie copie certifiée parlant et laissant la dite pièce à un des principaux employés au greffe d'appel en charge au dit greffe, au palais de justice à Montréal et ce après avoir fait les recherches nécessaires pour trouver les dits Lafleur & Macdougall sans pouvoir les trouver leur bureau étant fermé à clef, et je certifie de plus que le jour susdit entre les heures susdites j'ai signifié les dits inscription et avis, à Dame Emily C. Goddard, et Robert Craik, les intimés, en leur en laissant copies dument certifiées, en parlant à une personne raisonnable de leur famille en la Cité de Montréal.

Je certifie en outre que la distance de la dite Cour ainsi que celle de mon domicile jusqu'au lieu des significations susdites est de deux milles.

Montréal, 29 de juin, 1895.

Emoll. $3.50.

D. FORTIER, H. C. B. R.

(Endorsed.)

Inscription in Appeal and Notice—Filed 29th June, 1895.

(Paraphed) G. M.

In the Superior Court.

No. 2. Proceedings in the Superior Court from 19 May, 1892 to 10 July, 1895.

A.

The 19th May, 1892.

Messrs. Laflamme, Joseph & Cross, advocates, appear for the Opposants in this cause and file an *opposition afin de Conserver*, and also the affidavit of John J. MacCraken.

The 2nd August, 1892.

Messrs. Judah, Branchaud & Kavanagh, advocates, appear for the Petitioners in this cause and file a petition for intervention and notice, and also a certificate of service thereof.

Le 13 septembre, 1892.

L'Intervenant produit moyens au soutien de son intervention, les Opposants ayant reçu copie d'iceux.

RECORD.

In the Superior Court.

No. 2. Proceedings in the Superior Court from 19 May, 1892 to 10 July, 1895. —*continued.*

The 18th October, 1892.

The Opposants file answers to said intervention with a certificate of service thereof.

The 16th February, 1894.

The Opposants and Contestants file inscription of this cause for proof and final hearing on the merits and notice thereof, also a certificate of service.

The 23rd February, 1894.

The attorneys for Intervenant file notice of the death of the Intervenant in this cause, Alfred E. Roe, on or about the 10th August last (1893), with a certificate of service.

The 2nd April, 1894.

Messrs. Judah, Branchaud & Kavanagh, advocates, appear for the Petitioners in this cause, and file a petition *en reprise d'instance*, with a certificate of service.

Present :

The Hon. Mr. Justice TAIT.

Said petition is received.

The 26th April, 1894.

The Opposants file re-inscription of this cause for proof and final hearing on the merits, for the 8th May next and notice thereof, with a certificate of service.

The 11th May, 1894.

At the final hearing.

Present :

The Hon. Mr. Justice ARCHIBALD.

The parties file Admissions in this cause.

The Opposants file a list and six Exhibits marked Nos. 1, 2, 3, 4, 5, 6.

The Intervenants *par reprise d'Instance* file a list and one Exhibit marked No. 1.

P. O. C. A. V.

The 8th June, 1894.

No. 2A Judgement of the Superior Court rendered 8th June, 1894.

Present :

The Hon. Mr. Justice ARCHIBALD.

The Court having heard the parties (Opposants and Intervenants) on the merits of their respective contentions; examined the procedure documents of record and proof and deliberated :

For the considerations set forth in said judgment, being No. 18 of the record :

Doth maintain Opposants' opposition according the conclusions thereof above recited and doth dismiss the intervention of intervening parties with costs.

The 16th June, 1894.

Mtre. E. Lafleur appears for the Intervenants in this cause and file inscription of this cause, for hearing in review and notice thereof, with a certificate of service and of deposit.

The 19th June, 1895.

(In Review.)

Present:

The Hon. Mr. Justice LORANGER.
" " DAVIDSON.
" " DOHERTY.

No. 2B. Judgment of the Superior Court sitting in Review rendered 19th June, 1895.

The Court having heard the parties, Intervenant and Opposants upon the inscription in review by said Intervenant of the judgment rendered by the Superior Court for the district of Montreal, on the 8th day of June, 1894, maintaining the opposition of said Opposants and dismissing the intervention of Intervenant; examined the proceedings and proof of record, and deliberated;

Considering, that under the will of the late William Plenderleath Christie, the shares in the Seigneurie de Lery, held by Mary Robertson as substitute in the first degree under the substitution by said will created, did not at the death of said Mary Robertson pass to Amelia Robertson and Mary E. Tunstall, as substitutes in the second degree, as regards said share, but that any further substitution of said share created by said will, remained suspended pending the fulfilment of the conditions upon which it was by the terms of said will made dependant, namely, that two of said three persons, Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall, substitutes in the first degree, should die leaving no children which further substitution only took effect upon the fulfilment of said condition by the death, without children, of said Amelia Robertson.

Considering, therefore, that no portion of said share of said Mary Robertson in said Seigneurie ever passed to or was vested in said Amelia Robertson as substitute in the second degree under the terms of said will, and as such absolute owner thereof, as claimed by Opposants.

Considering that Opposants, as representatives of the said late Amelia Robertson, have failed to establish that they are entitled to one-half of the share in said Seigneurie so held by the late Mary Robertson, as claimed by their opposition herein, or to any share or part of said Seigneurie, or of the indemnity to be paid in lieu thereof.

Considering that there is error in said judgment of the Superior Court, as a Court of first instance;

Doth reverse the said judgment rendered by the Superior Court for the District of Montreal on the 8th June, 1894, and proceeding to render the judgment which said Superior Court should have rendered, doth maintain the intervention of Intervenant and dismiss the opposition of said Opposants with costs in the Court of first instance and in this Court, of which costs in the Court of first instance distraction is granted to MM. Judah, Branchaud & Kavanagh, attorneys for Intervenant in said Court.

The Honorable Justice Davidson is dissenting.

RECORD.

In the Superior Court.

The 29th June, 1895.

The Opposant file inscription in this cause to the Court of Queen's Bench in appeal of the judgment rendered by the Court of Review, on the 19th June, 1895, and notice of security, also a certificate of service thereof.

No. 2B. Judgment of the Superior Court sitting in Review rendered 19th June, 1895. —*continued.*

The 2nd July, 1895.

The Appellant files security in appeal, required by the law, and Messrs. George H. Massy and James F. Cunningham become sureties.

Montreal, 10th July, 1895.

J. DESROSIER,
Depy. S. C.

Schedule No. 1.

No. 3. Opposition *afin de conserver* dated 10 May, 1892.

Province of Quebec. } In the Superior Court.
District of Montreal. }

In the matter of

The Cadastre of the Seigniory de Lery,

and

Dame Charlotte de Hertel, & al, *es qual.*, - Opposants.

I, the undersigned, John Inkermann MacCraken, of the City of Ottawa, in the County of Carleton, in the Province of Ontario, barrister at law, being duly sworn make oath and say, that on the twenty-first day of May instant between the hours of twelve noon and one o'clock in the afternoon I did serve the hereunto annexed Opposition and Notice in this cause upon Her Majesty's Receiver-General for Canada in the City of Ottawa aforesaid by speaking to and leaving a true and certified copy of the said Opposition and Notice for the said Receiver-General with one Ernest Augustus Black, at and in charge of the office of the said Receiver-General at Ottawa aforesaid.

JOHN J. MACCRAKEN.

Sworn before me in the said City of Ottawa, in the County of Carleton aforesaid this twenty-third day of May, one thousand eight hundred and ninety-two.

N. A. BELCOURT,
A Commissioner for taking Affidavits in Ontario for use in Quebec.

Fees $2.04.

Canada.
Province of Quebec, } Superior Court.
District of Montreal. }

In the matter of

The Cadastre of the Seigniory de Léry,

and

Dame Charlotte de Hertel, & al., *es qual.*, - Opposants.

Dame Charlotte de Hertel, wife separated as to property of George E. Fenwick, doctor of medecine, both of the city and district of Montreal, and the latter to authorize his said wife, and the said George E. Fenwick and Dame Charlotte de Hertel, both herein acting in their quality of Executors of the last

will and testament of the late Amelia Robertson in her lifetime of Montreal aforesaid, spinster, executed before W. F. Lighthall and colleague, Notaries, at Montreal, on the eighth day of October one thousand eight hundred and seventy-nine, and of the codicil thereto before said Notaries, on the fifth day of February one thousand eight hundred and ninety-one, the Opposants in this matter, Who, for the purposes of the present opposition, hereby make election of domicile at the office of the undersigned, their Attorneys, situate at No. 11 Place d'Armes in the said city of Montreal, and declare that they oppose the distribution and payment of moneys due and payable by reason of the abolition of the seigniorial rights in the Seigniory De Léry, such as appears by the Cadastre thereof made and deposited according to law, unless such payment be made to the said Opposants for the amount herein claimed, and for reasons in support of their present opposition, they allege:

That William Plenderleath Christie was at the time of the making of the Cadastre of the Seigniory de Léry, the proprietor of said Seigniory, with all the rights thereto attached; and that he died at Blackrock near Dublin, Ireland, on the 4th May, 1845.

That by his holograph will dated 31st March, 1845, and duly protested, he bequeathed amongst other property the following:—

"I give, devise and bequeath to the said Catherine Robertson of Montreal, "widow, during her natural life and after her decease to her daughters Mary "and Amelia Robertson and to her neice 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 Seigniory de Léry, situated and being the said "Province of Canada, save and except the reservations hereinafter mentioned, and "all and every Terriers, Books, Papers and Maps belonging to said Seigniory "called Chazy situated in the United States of North America; and further all and "every the annual rent payable by the heirs and assigns of the late Edmond "Henry of Laprairie for the mills of Napierville in the said Seigniory de Léry, "together with all papers and documents relating to the said rent, 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 or parcel "of land called and known as the Seigniory de Léry save and except the re-"servations hereinafter mentioned, shall go and belong to the child or children "of the survivor in full and entire property."

That said Will was duly probated and registered according to law.

That Catherine Robertson after the testator's death enjoyed the property and legacy above described until her death which happened in or about the year eighteen hundred and fifty-eight.

That afterwards the same property was enjoyed by Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall, jointly until the death of Mary Robertson which happened in the year 1879, the latter having then died leaving no issue.

That afterwards Amelia Robertson and Mary Elizabeth Tunstall, enjoyed the same until the death of said Amelia Robertson, on the 8th February 1891, the latter having then died leaving no issue.

RECORD.

In the Superior Court.

No. 3. Opposition *afin de conserver* dated 10 May, 1892. —*continued.*

That said Amelia Robertson made a will before Lighthall and colleague, Notaries, on the 8th October 1879, and a codicil before same Notaries on the 5th February 1891, both of which were duly registered, and she appointed the said Opposant Dame Charlotte de Hertel her universal legatee and also her executrix together with the latter's husband, the other Opposant.

That it appears from the above and by the will of the late W. P. Christie above referred to, that the said mentioned Dame Catherine Robertson became vested with the said Seigneurie de Lery, with the obligation to transmit the same to her two daughters and neice.

That after her death, the said property was vested in her two daughters and neice for one-third each, with the charge of substitution in favor of their children respectively, and in default of issue between the co-legatees.

That Mary Robertson (one of the said daughters), having died without issue, as above mentioned, her share accrued, came and was rendered and transmitted to the surviving legatees, Amelia Robertson and Mary Elizabeth Tunstall, who became possessed and seized as absolute owners of the one-third share enjoyed by said Mary Robertson, the substitution ending with her; and therefore said Amelia Robertson had the right to dispose by will or otherwise of the one-half of the share of her sister Mary in the said Seigniory, which she has done as above mentioned, in favor of the said Opposant.

That said Opposants are entitled in their above capacities, and the said Dame Charlotte de Hertel in full ownership and property to the one-sixth of all and every the Seigniorial rights, *lods et ventes* or otherwise of the said Seigniory de Lery, which represents the one-half of the third share belonging to Amelia Robertson by the pre-decease of Mary Robertson.

Wherefore, said Opposants in their quality of executors as aforesaid pray that said female Opposant be adjudged and declared to be the owner for one-sixth of the said Seigniory de Léry, that all seigniorial rights and dues to the extent of said share, including *cens et rentes, lods et ventes, droits de banalité* and other rights and privileges or any indemnity in lieu thereof to be redeemed or paid by the Government of Canada or any public officer or any person, be paid to her as such owner and as being entitled to the same and to said Opposants in their said quality.

Montreal, 10th May, 1892.

LAFLAMME, JOSEPH & CROSS,
Attorneys for said Opposant.

The Government of Canada and the Receiver General of Canada are hereby notified that the foregoing Opposition has this day been filed in the office of the Prothonotary of the Superior Court in and for the District of Montreal, and are requested not to make payments of the moneys therein mentioned except according to the conclusions of said opposition and only in accordance with such judgment as may be rendered thereon.

Montreal, 19th May, 1892.

LAFLAMME, JOSEPH & CROSS,
Attorneys for Opposants.

(Endorsed.)

Opposition afin de Conserver and Notice—Fyled 19 May, 1892.

(Paraphed) G. K., D. P. S. C.

RECORD.

In the Superior Court.

No. 4. Petition for Intervention dated 2 August, 1892.

Schedule No. 2.

Province of Quebec, } Superior Court.
District of Montreal. }

In the matter of

The Cadastre of the Seigniory De Lery,

and

De Charlotte de Hertel & al., *es qualité*, - - Opposants.

and

Alfred Edward Roe, of the City of Montreal, gentleman,
Petitioner in Intervention.

To any of the Honorable Judges of the Superior Court for the Province of Quebec, sitting in Montreal.

The Petition of the said Alfred Edward Roe. Humbly representeth :

That your Petitioner is the only child, issue of the marriage of the late Dame Mary Elizabeth Tunstall, referred to in the said opposition, with the late Edward Roe, in his lifetime of Montreal, gentleman ;

That, as stated in the opposition of the said Opposants, Mary Robertson and Amelia Robertson, two of the legatees mentioned in the will referred to in the said opposition, died—being unmarried—before the said Mary Elizabeth Tunstall, who, as stated in said opposition, died afterwards on the thirtieth day of October last (1891).

That under the terms of the will of the said William Plenderleath Christie the whole of the said Seigniory and rights of *lods et ventes*, &c. devolved to your Petitioner, who, according to the will, has by the death of the said Mary Robertson and Amelia Robertson as aforesaid before Dame E. M. Tunstall, his mother, became the sole proprietor of the whole of the said Seigniory and rights of *lods et ventes*, and since the death of his mother, the usufruct created by said will in favor of the survivor of the said three legatees lapsed, it being vested in the Petitioner as proprietor of the Seigniory and rights of *lods et ventes*.

That your Petitioner avers that the Opposants have no right to claim any portion of the said Seigniory and *lods et ventes* and that he is therefore interested to intervene in the opposition for the protection of his own rights which are encroached upon by the said Opposants.

Wherefore your Petitioner prays that he be allowed for the protection of his rights illegally encroached upon by the said opposition in order to contest it for all such legal reasons and grounds as the Petitioner may have a right to urge, the whole with costs.

Montreal, August, 1892.

JUDAH, BRANCHAUD & KAVANAGH,
Attorneys for Petitioner.

RECORD.

In the Superior Court.

No. 4. Petition for Intervention dated 2 August, 1892. —*continued.*

To Messrs. Laflamme, Joseph & Cross,
Attorneys for Opposants.
The Honourable Receiver General of the Dominion of Canada.

Gentlemen,

Take notice of the foregoing intervention received this second day of August instant, and you are notified to fyle your answer thereto, if you see fit, within the delay required by law.

Montreal, 2nd August, 1892.

JUDAH, BRANCHAUD & KAVANAGH,
Attorneys for Intervenant.

(On the back.)

Je, J. A. Lepallieur, huissier juré de la Cour Supérieure pour la Province de Québec, exerçant pour le district de Montréal, certifié sous mon serment d'office que le deuxième jour d'aout mil huit cent quatre vingt douze entre onze heures et midi. J'ai signifié la présente requête pour intervention et avis à Mtrs. Laflamme, Joseph & Cross, avocats de l'Opposant en cette cause à l'Honorable Receveur-Général de la Puissance du Canada, en laissant à chacun une copie certifiée d'iceux, parlant et laissant les dites copies comme suit à Messieurs Laflamme, Joseph & Cross, à une personne raissonnable de leur bureau en la Cité de Montréal, et à l'Hble. Receveur-Général, en laissant les dites copies au bureau des Protonotaires de la Cour Supérieure du district de Montréal.

Montréal, 2 août, 1892.

Emol. 2 signif. à .30 .60c. J. A. LEPALLIEUR, H.C.S.

(Endorsed.)

Petition for Intervention and Notice.—Fyled 2 août, 1892.

(Paraphed) G. H. K., Dep. P. S. C.

No. 5. *Moyens au soutien de l'Intervention*, dated 9 September, 1892.

Schedule No. 3.

Province de Québec, } Cour Supérieure.
District de Montréal, }

Dans l'affaire du
Cadastre de la Seigneurie de Léry,
No. 1460.
and
Dame Charlotte de Hertel, & al., *es qual.*, - Opposants.
and
Alfred E. Roe, - - - - - - Intervenant.

Et le dit Intervenant pour moyens au soutien de son intervention produite en cette opposition, allégue et dit:—

Qu'il est faux que feu Amélia Robertson mentionnée dans la dite opposition ait été propriétaire d'un sixième de la dite Seigneurie de Lery, ni d'aucune des droits de lods et ventes et autres redevances attachés à la dite Seigneurie.

Que d'après les termes de testament récité dans la dite opposition, le testateur a légué d'abord l'usufruit à Cathérine Robertson, pour par elle en jouir sa vie durant et à son décès, l'usufruit a été légué à Mary Robertson, Amélia

Robertson et Mary Elizabeth Tunstall, pour par elles en jouir conjointement et par parts égales, leur vie durante, et à leur décès la dite Seigneurie devant retourner en propriété à leurs enfants issus de légitime mariage, mais si deux des dits trois légataires en dernier lieu mentionnées mouraient sans postérité, il est dit que la propriété de la Seigneurie appartiendrait alors aux enfants de la survivante de ces trois légataires.

Que Mary Robertson étant décédée sans laisser d'enfants, sa part d'usufruit est dévolue par accroissement à Amélia Robertson et Mary Elizabeth Tunstall.

Que la dite Mary Elizabeth Tunstall se serait mariée à Edward Roe, décédé depuis plusieurs années et que de son dit mariage serait né le dit Intervenant.

Que la dite Amélia Robertson serait aussi décédée, sans laisser de postérité avant la dite Dame Mary Elizabeth Tunstall qui est aussi décédée, depuis le trente octobre, mil huit cent quatre-vingt-onze (1891).

Que d'après les termes du dit testament le dit Intervenant est devenu seul propriétaire de la dite Seigneurie, comme étant le seul enfant légitime de la dite Mary Elizabeth Tunstall, par suite des décès des dites Mary Robertson et Amélia Robertson avant celui de la dite Mary Elizabeth Tunstall.

Qu'il est faux que d'après la loi les dites Amélia Robertson et Mary Elizabeth Tunstall soient devenues par suite du décès de la dite Mary Robertson, propriétaires du tiers de la dite Seigneurie, mais qu'au contraire elles n'ont eu qu'un droit d'usufruit de la Seigneurie, qui s'est éteint par le décès de chacune d'elles

Que la dite Amélia Robertson n'a pu disposer d'aucune partie de la dite Seigneurie par son dit testament, attendu qu'elle n'a jamais eu aucun droit de propriété d'aucune partie de la Seigneurie

Que les dits Opposants ne peuvent réclamer aucune partie de la dite Seigneurie en vertu du dit testament de la dite Amélia Robertson, cette dernière n'ayant pas été à son décès saisie d'aucun droit de propriété dans la dite Seigneurie.

Que les dits Opposants ont d'ailleurs reconnu le dit Intervenant comme étant le seul propriétaire de la dite Seigneurie.

Que les allégués même de la dite opposition dévoilent, que les Opposants ne peuvent réclamer aucun droit de propriété dans la dite Seigneurie.

Que les dits Opposants sont sans droit à faire la présente opposition.

C'est pourquoi le dit Intervenant conclut à ce qu'il soit déclaré le seul propriétaire de la Seigneurie, et à ce que la dite opposition des dits Opposants soit déboutée avec dépens dont distraction aux soussignés.

Montréal, 9 septembre, 1892.

JUDAH, BRANCHAUD & KAVANAGH,
Avocats de l'Intervenant.

Reçu copie.

LAFLAMME & CIE,
Avocats des Opposants.

(Endorsed.)

Moyens au soutien de l'intervention. — Prod. 13 sept., 1892.

(Paraphed) G. H. K., Dep. P. S. C.

RECORD.

Schedule No. 4.

In the Superior Court.

No. 6. Answer to Intervention dated 20 September, 1892.

Province of Quebec, District of Montreal. } Superior Court.

In the matter of

The Cadastre of the Seigniory De Léry,

and

Dame Charlotte de Hertel & al., - - - - Opposants.

and

Alfred E. Roe, - - - - - Intervening Party.

The said Opposants for contestation and answer of said Alfred E. Roe's Intervention, say:

That all matters of fact stated in said intervention, are false, untrue and specially denied.

That said intervention is unfounded and said Intervening party has no right nor status to claim as he has done by his said intervention.

That as stated in the opposition fyled by said Opposants, William Plenderleath Christie was at the time of the making of the Cadastre of the Seigniory de Léry, the proprietor of said Seigniory, with all the rights thereto attached; and that he died at Blackrock, near Dublin, Ireland on the fourth May one thousand eight hundred and forty-five.

That by his holograph will, dated 31st March, 1845, and duly probated, he bequeathed, amongst other property, the following:

"I give, devise and bequeath, to the said Katherine Robertson of Montreal, widow during her natural life and, after her decease 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 and entire property share and share alike, all and every the tract and parcel of land called and known as the Seigniory de Léry, situated and being in the said Province of Canada, save and except the reservations hereinafter mentioned; and all and every the terriers, books, papers and maps belonging to said Seigniory de Léry or concerning another seigniory called Chazy situated in the United States of North America; and further all and every the annual rent payable by the heirs and assigns of the late Edmond Henry, of Laprairie, for the mills of Napierville in the said Seigniory de Léry, together with all papers and documents relating to the said rent;" the testator further declaring as follows, to wit: (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 Seigniory de Léry "except certain reservations" shall go and belong to the child or children of the survivor in full and entire property.

That said will was duly probated and registered according to law.

That Katherine Robertson after the testator's death enjoyed the property and legacy above described until her death which happened about and preceded that of any of her said daughters and niece named in said will.

That afterwards the same property was enjoyed by Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall jointly, until the death of Mary Robertson which happened in 1879, leaving no issue.

That afterwards Amelia Robertson and Mary Elizabeth Tunstall enjoyed the same until the death of said Amelia Robertson on the eight February 1891, leaving no issue.

That said Amelia Robertson made a will, before Lighthall and colleague, Notaries, on the eighth October, one thousand eight hundred and seventy-nine and a codicile, before the same Notaries, on the fifth February, one thousand eight hundred and ninety-one, both of which were duly registered and she appointed the said Opposant, Dame Charlotte de Hertel her universal legatee and also her executrix together with the latter's husband, the other Opposant.

That it appears from the above and by the will of the late W. P. Christie above referred to, that the said mentioned Dame Katherine Robertson became vested with the said Seigniory de Léry with the obligation to transmit the same to her two daughters and niece.

That after her death, the said property was vested in her two daughters and niece, for one-third each, with the charge of substitution in favor of their children respectively, and in default of issue between the co-legatee.

That Mary Robertson, one of the said daughters having died without issue, as above mentioned, her share accrued, became and was rendered and transmitted to her surviving legatees Amelia Robertson and Mary Elizabeth Tunstall who became possessed and seized as absolute owners of the one-third share enjoyed by said Mary Robertson, the substitution ending with her; and therefore said Amelia Robertson had the right to dispose by will or otherwise of the one-half of the share of her sister Mary in said Seigniory, which she has done as above mentioned in favor of the said Opposant.

That said Opposants are entitled in their above capacities and the said Dame Charlotte de Hertel in full ownership and property to the one-sixth of all and every the seignioral rights, *lods et ventes* or otherwise of the said Seigniory de Léry which represents the one-half of the third share belonging to Amelia Robertson by the pre-decease of Mary Robertson.

That said Intervening Party has no right nor claim in the premises, and the averments of his said intervention, contrary to the above, are unfounded.

Wherefore said Opposants persisting in the conclusions of their opposition, and making option to have this cause inscribed at the same time for proof and hearing on the merits, pray for the dismissal of said intervention with costs distraits to the undersigned.

Montreal, 20th September, 1892.

LAFLAMME, JOSEPH & CROSS,
Attorneys for Opposants.

(On the back.)

Je, soussigné, résidant à Montréal, huissier juré de la Cour Supérieure du Bas-Canada, exerçant dans le District de Montréal, certifie sous mon serment d'office, que le vingt-quatre septembre courant, 1892, entre une et deux heures de l'après midi, j'ai signifié à MM. Judah, Branchaud & Kavanagh, avocats de l'Intervenant en cette cause, les réponses à l'intervention en leur laissant une vraie copie dûment certifiée, en parlant à Mons. Judah l'un des dits avocats en leur bureau dans la Cité de Montréal.

RECORD.

In the Superior Court.

No. 6. Answer to Intervention dated 20 September, 1892. —*continued.*

La distance du Palais de Justice, à Montréal jusqu'au lieu de la signification susdite est de moins d'un mille, et celle de mon domicile à Montréal est de moins d'un mille.

Montréal, 24me septembre, 1892. D. FORTIER, H. C. S.

Frais 30 cts.

(Endorsed.)

Answers to Intervention—Fyled 18th October, 1892.

(Paraphed) G. H. K., D. P. S. C.

Schedule No. 5.

No. 7. Inscription for proof and final hearing, dated 16 Feb., 1894.

Province of Quebec, District of Montreal. } Superior Court.

No. 1460.

In the matter of

The Cadastre of the Seigniory de Lery,

and

Dame Charlotte de Hertel & al., *es qual.* - - Opposants.

and

Alfred E. Roe - - - - - - - - Intervenant;

and

The said Opposants - - - - - - - Contestants.

The said Opposants contesting hereby inscribe this cause on the roll for proof and final hearing on the merits immediately after proof upon the intervention of the said Intervenant, and hereby give notice of this inscription to Mtres. Judah, Branchaud & Kavanagh, Attorneys for Intervenant.

Montreal, 16th February, 1894. JOSEPH & CROSS, Survivors of Opposants' Attorneys.

(On the back.)

Je soussigné, résidant à Montréal, huissier juré de la Cour Supérieure du Bas-Canada exerçant dans le District de Montréal, certifie sous mon serment d'office, que le seize de février courant 1894, entre deux et trois heures de l'après midi j'ai signifié à MM. Judah, Branchaud & Kavanagh, avocats pour l'intervenant l'inscription et avis d'autre part, en leur en laissant copie dument certifié en parlant à Mons. Branchaud en personne en leur bureau dans la dite Cité de Montréal.

La distance du Palais de Justice, à Montréal, jusqu'au lieu de la significat tion susdite est de moins d'un mille, et celle de mon domicile à Montréal es- de moins d'un mille.

Montréal, 16 février, 1894.

Emoll. 30 cts. D. FORTIER, H. C S.

(Endorsed.)

Inscription for proof and final hearing. Filed 16th February, 1894, with deposit of ten dollars. A. B.

(Paraphed) G. H. K., Dep. P. S. C.

No. 8. Notice of death of A. E. Roe, the Intervenant dated 16 Feb., 1894.

Schedule No. 6.

Province of Quebec, } Superior Court.
District of Montreal. }
No. 1460.

In the matter of
The Cadastre of the Seigniory de Lery,
and
Dame C. de Hertel & al. *es qual.*, - - - Opposants;
and
A. E. Roe, - - - - - - - - Intervenant;
and
The said Opposants, - - - - - Contestants.

To Messrs. JOSEPH & CROSS,
Attorneys for Opposants.

Sirs,

Take notice that the Intervenant in this cause, Alfred E. Roe, died on or about the tenth day of August last (1893).

Montreal 16th February, 1894.

JUDAH, BRANCHAUD & KAVANAGH,
Attys. for Intervenant.

(On the back.

I, Damase A. St. Amour, residing in Montreal, one of the sworn Bailiffs of the Superior Court for the Province of Quebec, duly named for the District of Montreal, do hereby certify under my oath of office that, on the nineteenth day February, one thousand eight hundred and ninety-four, between the hours of ten and eleven o'clock in the forenoon, I did serve upon Messrs. Joseph & Cross, Attys for Opposants in this cause, the within notice, by leaving a duly certified copy thereof for them, by speaking to Mr. Cross, one of said attorneys in person at his office in the City of Montreal.

The distance from the Court House, in Montreal, to aforesaid place of service, is less than one mile, and that I did necessarily travel to effect said service, the distance of less than one mile.

Montreal, 19 February, 1894.

Fees, $0.30. D. A. ST. AMOUR, B. S. C.

(Endorsed.)

Notice to Opposants' Attorneys that A. E. Roe, the Intervenant, is dead. Fyled 23 February, 1894.

(Paraphed) G. H. K., Dep. P. S. C.

RECORD.

In the Superior Court.

No. 9. Petition *en reprise d'instance*, dated 28 March 1894

Schedule No. 7.

Province of Quebec, } Superior Court.
District of Montreal. }

No. 1460.

The Cadastre of the Seigniory De Lery,

and

Dame Charlotte de Hertel & al., - - - Opposants.

and

A. E. Roe, - - - - - - - - Intervenant.

To the Superior Court for Lower Canada, sitting in and for the district of Montreal.

The Petition of Dame Emily Charlotte Goddard, of the city of Montreal, widow of the said late Alfred Edward Roe, the Intervenant herein, acting in her capacity of testamentary executrix of the said late Alfred Edward Roe under his last will and testament and the codicil thereto duly probated at Montreal on the sixteenth August last (1893), as well as in her capacity of tutrix to her minor daughter Florence Roe, issue of her marriage with her said late husband, duly named and appointed such tutrix by *acte de tutelle* duly homologated at Montreal, on the thirteenth day of September last (1893), and Robert Craik of the same place, doctor in medicine, in his capacity of curator, duly appointed under and by virtue of an *acte de curatelle* duly homologated at Montreal on the thirteenth September last (1893), to the substitution created by the said last will and testament of the said late Alfred Edward Roe;

Respectfully represents:

That the said late Alfred Edward Roe died previous to the sixteenth August last (1893) having made his last will and testament as hereinabove stated in favor of his said daughter Florence Roe, a minor, as institute and creating a substitution.

That your Petitioner Emily Charlotte Goddard, is the executrix of the last will and testament of her said late husband and the tutrix of her said daughter Florence Roe, and that your other Petitioner Robert Craik is the curator duly appointed as aforesaid to the said substitution, that your Petitioners in their said qualities respectively are the only persons having the right to continue the proceedings herein as Intervenants.

Wherefore your Petitioners pray that in their said respective capacities they be permitted to continue proceedings in this cause as Intervenants (*reprendre l'instance*) from the last proceedings herein the whole with costs to follow the result of the suit.

Montreal, 28th March, 1894.

JUDAH, BRANCHAUD & KAVANAGH,
Attys. for Petitioners *es qual.*

No. 9. Petition *en reprise d'instance*, dated 28 March 1894 —*continued.*

To Messrs. Joseph & Cross,
Attorneys for Opposants.

Sirs:

Take notice of the foregoing Petition and that the same will be presented to the Superior Court, Montreal in the Practice Division thereof on Monday the second day of April next at half past ten of the clock in the forenoon or as soon thereafter as Counsel can be heard.

Montreal 28th March, 1894.

JUDAH, BRANCHAUD & KAVANAGH,
Attorneys for Petitioners *es qual.*

(Endorsed.)

Petition *en reprise d'instance.* Fyled 2 avril, 1894.
Requête reçue par M. le juge Tait.
(Paraphed) G. H. K., Dep. P. S. C.

No. 10. *Re* Inscription for enquête and merits, dated 24 April, 1894.

Schedule No. 7A.

Province of Quebec, } Superior Court.
District of Montreal. }

No. 1460.

The Cadastre of the Seigniory De Léry,
and
Dame Charlotte de Hertel & al., - - - - Opposants.
and
Alfred E. Roe, - - - - - - - Intervenant.
and
Dame Emily Charlotte Goddard & al., *es qual.*,
Intervenants *par reprise d'instance.*

The said Opposants hereby re-inscribe this cause for proof and final hearing on the merits immediately after proof, on the eighth day of May next, and hereby give notice of this inscription to Messrs. Judah, Branchaud & Kavanagh, Attorneys for Intervenants *par reprise d'instance.*

Montreal, 24th April, 1894.

JOSEPH & CROSS,
Survivors of Opposants' Attorneys.

(Endorsed.)

Re-inscription for Enquête and Merits.—Fyled 26 avril, 1894.
(Paraphed) G. H. K., Dep. P. S. C.

RECORD.

In the Superior Court.

No. 11. Admissions of parties, dated 9 May, 1894.

Schedule No. 8.

Province of Quebec, } Superior Court.
District of Montreal, }

No. 1460.

The Cadastre of the Seigniory de Léry,

and

Dame Charlotte de Hertel, & al., *es qual.*, - Opposants.

and

Alfred E. Roe, - - - - - - Intervenant.

and

Dame Emily C. Goddard & al., *es qual.*, - Intervenant *par reprise.*

To save costs the parties admit:

1o. That the late William Plenderleath Christie died at Blackrock, in Ireland, on the 4th May, 1845, that the copy of his will herein filed is a true copy and was duly registered.

2o. That Katherine Robertson named in said will died about the year eighteen hundred and fifty-eight, after having accepted the legacy or disposition made in her favor in said will.

3o. That Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall, accepted and enjoyed the property affected by the disposition of the said will in their favor jointly together until the death of the said Mary Robertson after which the said Amelia Robertson and Mary E. Tunstall enjoyed the property affected by the same disposition of said will, jointly until the death of the said Amelia Robertson, and that the said Mary Robertson and Amelia Robertson departed this life without issue at the dates mentioned in the certified extracts of burial herein filed.

4. That Alfred E. Roe, the Intervenant, (now represented by the Intervenants *par reprise d'instance,*) was the son and issue of the marriage of the said Mary E. Tunstall with the late Edward Roe, and is the Plaintiff mentioned in the writ and declaration fyled by the Intervenant as his exhibit in this cause.

5o. The parties consent that this cause be considered inscribed as well on the merits of this intervention as of the opposition of said Opposants.

Montreal, 9th May, 1894.

JUDAH, BRANCHAUD & KAVANAGH,
Attorneys for Intervenants *par reprise.*

JOSEPH & CROSS,
Attorneys for Opposants Contesting.

(Endorsed.)

Admissions.—Fyled 11 mai, 1894.

(Paraphed) D. G., D. P. S. C.

RECORD.

In the Superior Court.

No. 12.
Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845
Opposants' exhibit No. 1.

Schedule No. 10.

To the Honorable The Chief Justice and the Justices of the Court of Queen's Bench for the district of Montreal :

The Petition of William McGinnis of Christieville in this district, esquire, and Richard McGinnis of St. Johns in this district, esquire, Humbly sheweth :

That William Plenderleath Christie of Christieville in the Seigniory of Bleury, esquire, Seignior of the said Seigniory and of other places in this district of Montreal, died at Blackrock near Dublin in Ireland, on the fourth of May last, having left a will executed before witnesses on the seventeenth of March, one thousand eight hundred and forty-two at Christieville aforesaid, that the said William Plenderleath Christie also left a codicil to said will, which codicil was executed before witnesses, and is dated at Christieville aforesaid, the eighteenth of April, one thousand eight hundred and forty-three, and also another later codicil to said will, which codicil, in his own handwriting, is dated at Great Malvern, Worcestershire, England, the thirty-first of March, one thousand eight hundred and forty-five.

That of said Will and Codicils your Petitioners are named two of the Executors. That it is necessary that said Will and Codicils should be proved, to the end that the same be received and fyled in the office of the Court of Queen's Bench for this district, and that the intentions of the Testator may be carried into effect, and that authentic copies of said Will and Codicils may be obtained, according to law, by all parties interested.

Your Petitioners therefore pray, that they may be permitted to produce said Will and Codicil, and to bring forward proof of the authenticity thereof, to the end that probate thereof be granted, and that said Will and Codicils be received and fyled in the office of the Court of Queen's Bench for this district, for all legal purposes, and that authentic copies thereof may be delivered to all persons concerned therein.

(Signed) WM. MCGINNIS.
Montreal, June 13th, 1845. " R. B. MCGINNIS.

Let Probate be made of said Will and Codicils.
Montreal, June 13th, 1845.
(Signed) SAML GALE, J. B. R.

On the thirteenth day of June, 1845, personally came and appeared before me The Honorable Samuel Gale, one of the Justices of the Court of Queen's Bench for the district of Montreal, Orange Tyler of Christieville, in this district bailiff, who being duly sworn deposeth and saith :—That on the seventeenth day of March, one thousand eight hundred and forty-two, at Christieville aforesaid, he, this deponent was present together with William McGinnis of Christieville aforesaid, esquire, and James Kearns of the same place, farmer, and did see William Plenderleath Christie late of Christieville aforesaid deceased, then alive, in the presence of deponent and of said William McGinnis and James Kearns, sign, seal, publish and declare the instrument or writing contained on the seventeen pages and part of the eighteenth page of paper now exhibited to him, purporting to be the last Will of the said late William Plenderleath Christie, as and for the last Will and Testament of him the said William Plenderleath Christie.

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. — *continued.*

That the name "W. P. Christie" subscribed to said Will and Testament is the proper handwriting and signature of the said late William Plenderleath Christie and was written and subscribed by him in the presence of this deponent and of said William McGinnis and James Kearns, and that the names "W. McGinnis," "Orange Tyler," "James Kearns."

James Kearns set and subscribed to said last Will and Testament as the signatures of the witnesses to the execution thereof are of the respective proper handwriting of the said William McGinnis, of this deponent, and of said James Kearns, who, at the request of the said late William Plenderleath Christie, in his presence, and in the presence of each other, subscribed their names to said Will and Testament, as witnesses to the execution thereof by the said William Plenderleath Christie.

(Signed) ORANGE TYLER.

Sworn at Montreal, this thirteenth day of June, one thousand eight hundred and forty-five, before me,

(Signed) SAM'L GALE, J. B. R.

And at the same time and place personally came and appeared before me, the Honorable Samuel Gale, one of the Justices of the Court of Queen's Bench for the District of Montreal, James Kearns of Christieville, in this district, farmer, who being duly sworn, deposeth and saith :—That on the seventeenth day of March, one thousand eight hundred and forty-two, at Christieville aforesaid, he, this deponent, was present, together with William McGinnis of Christieville aforesaid, esquire, and Orange Tyler of the same place, bailiff, and did see William Plenderleath Christie, late of Christieville aforesaid, deceased, then alive, in the presence of deponent, and of said William McGinnis, and Orange Tyler, sign, seal, publish and declare the instrument or writing contained in the seventeen pages and part of the eighteenth page of paper now exhibited to him purporting to be the last Will and Testament of him the said William Plenderleath Christie.

That the name "W. P. Christie," subscribed to said Will and Testament is the proper handwriting and signature of the said late William Plenderleath Christie, and was written and subscribed by him in the presence of this deponent and of said William McGinnis and Orange Tyler, and that the names "W. McGinnis," "Orange Tyler," "James Kearns."

James Kearns set and subscribed to said Will and Testament as the signature of the witnesses to the execution thereof are of the respective proper handwritings of said William McGinnis, the said Orange Tyler and of this deponent, who, at the request of the said late William Plenderleath Christie, in his presence and in the presence of each other, subscribed their names to said Will and Testament, as witnesses to the execution thereof by the said William Plenderleath Christie.

(Signed) JAMES KEARNS.

Sworn at Montreal, this thirteenth day of June, one thousand eight hundred and forty-five, before me,

(Signed) SAM'L GALE, J. B. R.

And at the same time and place, personally came and appeared before me the Honorable Samuel Gale, one of the Justices of the Court of Queen's Bench, for the District of Montreal, the Reverend Frederick Brown of Laprairie, clerk, who being duly sworn deposeth and saith :—That on the eighteenth day of April, one thousand eight hundred and forty-three, at Christieville, in the district of Montreal, he, this deponent, was present, together with the Reverend William Dawes, of St. Johns, clerk, and William McGinnis of Christieville, in this district, esquire, and did see the said William Plenderleath Christie of Christieville aforesaid, in the presence of said Reverend William Dawes and William McGinnis, and of this deponent, sign and execute the instrument or writing contained on the four pages of paper now exhibited to him, purporting to be a Codicil to the last Will and Testament of the said William Plenderleath Christie, dated the seventeenth day of March, one thousand eight hundred and forty-two.

That the name "W. P. Christie," subscribed to said Codicil, is the signature and proper handwriting of the said late William Plenderleath Christie and was subscribed by him in the presence of this deponent, and of said Reverend William Dawes and William McGinnis aforesaid, and that the names "Frederick Broome, clerk," William Dawes, clerk," "W. McGinnis," set and subscribed to said Codicil as the signatures of the witnesses to the execution thereof are of the respective proper handwritings of this deponent, of said Reverend William Dawes and of said William McGinnis, who at the request of the said William Plenderleath Christie, in his presence and in the presence of each other subscribed their names to said Codicil as witnesses to the execution thereof by the said William Plenderleath Christie.

That he, this deponent, was well acquainted with the said William Plenderleath Christie. now deceased, and hath seen him write and sign his name; and the instrument or writing contained on the four pages of paper now exhibited to him, this deponent, purporting to be a Codicil to the last Will and Testament of the said late William Plenderleath Christie, bearing date the seventh day of April one thousand eight hundred and forty-three, the said Codicil purporting to be written by the hand of the said William Plenderleath Christie at Great Malvern, Worcestershire, on the thirty-first day of March, one thousand eight hundred and forty-five) is, as deponent verily believes, entirely the proper handwriting of said William Plenderleath Christie, save and except the signatures "Frederic Goold, Clk.", "George Bradshaw," "Richard Rogers Corwell," subscribed as the signatures of the witnesses to said Codicil, on the fourth and last page thereof.

That the signature "W. P. Christie," set and subscribed to said Codicil at the end thereof, on the fourth page thereof, is the proper handwriting and signature of said William Plenderleath Christie, now deceased.

And deponent saith that he is informed and doth believe, that the said Frederic Goold, clerk, George Bradshaw and Richard Rogers Corwell, whose names are written on fourth page of said Codicil, as the names of the witnesses to the execution thereof, are all absent from this Province of Canada.

(Signed) FRED. BROOME.

Sworn at Montreal, this thirteenth day of June, one thousand eight hundred and forty-five, before me, (Signed) SAM'L GALE, J. B. R.

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. — *continued.*

And at the same time and place, personally came and appeared before me, the Honorable Samuel Gale, one of the Justices of the Court of Queen's Bench for the district of Montreal, the Reverend William Dawes, of St. John's in this district, clerk, who being duly sworn, deposeth and saith :—That, on the eighteenth day of April, one thousand eight hundred and forty-three, at Christieville, in this district of Montreal, he, this deponent, was present, together with the Reverend Frederick Broome, of Laprairie, clerk, and William McGinnis, of Christieville, esquire, and did see the said William Plenderleath Christie, of Christieville, aforesaid, in the presence of Reverend Frederick Broome and said William McGinnis, and of this deponent, sign and execute the instrument or writing contained on the four pages of paper now exhibited to him, purporting to be a Codicil to the last Will and Testament of the said William Plenderleath Christie, dated the seventeenth day of March, one thousand eight hundred and forty-two.

That the name "W. P. Christie," subscribed to said Codicil is the signature and proper handwriting of said late William Plenderleath Christie, and was subscribed by him in the presence of this deponent and of said Reverend Frederick Broome and of said William McGinnis aforesaid, and that the names "Frederick Broome, clerk," "Wm. Dawes, clerk," "W. McGinnis," set and subscribed to the said Codicil as the signatures of the witnesses to the execution thereof, are of the respective proper handwriting of said Reverend Frederick Broome, of this deponent, and of said William McGinnis, who, at the request of the said William Plenderleath Christie, in his presence, and in the presence of each other, subscribed their names to the said Codicil as witnesses to the execution thereof, by said William Plenderleath Christie.

That he, this deponent, was well acquainted with said William Plenderleath Christie, now deceased, and hath seen him write and sign his name; that the instrument or writing contained on the four pages of paper now exhibited to him, this deponent, purporting to be a Codicil to the last Will and Testament of the said late William Plenderleath Christie, bearing date the seventh day of April, one thousand eight hundred and forty-three (the said Codicil purporting to be written by the hand of the said William Plenderleath Christie, at Great Malvern, Worcestershire, on the thirty-first day of March, one thousand eight hundred and forty-five) is, as deponent verily believes, entirely of the proper handwriting of the said William Plenderleath Christie, save and except the signatures "Frederic Goold, Clk." George Bradshaw," "Richard Rogers Corwell," subscribed as the signatures of the witnesses to said Codicil on the fourth and last page thereof.

That the signature "W. P. Christie," set and subscribed to said Codicil at the end thereof on the fourth page thereof, is the proper handwriting and signature of the said William Plenderleath Christie, now deceased.

And deponent saith that he is informed and doth believe that the said Frederic Goold, clerk, George Bradshaw, and Richard Rogers Corwell, whose names are written on the fourth page of said Codicil, as the names of the witnesses to the execution thereof, are all absent from this Province of Canada.

(Signed) WM. DAWES.

Sworn at Montreal, this thirteenth day of June, one thousand eight hundred and forty-five, before me, (Signed) SAM'L GALE, J. B. R.

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. —*continued.*

Be it remembered, that on the thirteenth day of June, 1845, at the City of Montreal, before me, the Honorable Gale, one of the Justices of the Court of Queen's Bench for the District of Montreal, personally appeared William McGinnis, of Christieville, in this district, esquire, and Richard McGinnis, of St. Johns, in this district, esquire, two of the Executors of the last Will and Testament of the late William Plenderleath Christie, of Christieville, in the Seigniory of Bleury, esquire, Seignior of the said Seigniory and of other places in this district, who by virtue of the *Fiat* upon the petition presented to me this day, produced the last Will of said late William Plenderleath Christie, dated seventeenth of March, one thousand eight hundred and forty-two, at Christieville aforesaid, and also a Codicil thereto, dated the eighteenth of April, one thousand eight hundred and forty-three, at Christieville aforesaid, and also a later Codicil thereto, dated the thirty-first of March, one thousand eight hundred and forty-five, at Great Malvern in Worcestershire, and prayed to be admitted to proof thereof, and due proof having been made thereof before me this day, as appears by the foregoing depositions. I order that the said last Will and Testament and the said two Codicils thereto be deposited in the archives of the Court of Queen's Bench, and enregistered in the Register of Probates for this district of Montreal, and that copies thereof be granted to all persons applying for the same according to law.

Given at Montreal aforesaid, the thirteenth day of June 1845.

[L. S.] (Signed) SAM'L GALE, J. B. R.

The Last Will and Testament of me William Plenderleath Christie, a resident of Christieville, in the Seigniory Bleury, in the Province of Canada:

Considering the great uncertainty of life and the certainty of death at an hour unknown to mortals, I feel it a solemn duty to set in order all my worldly affairs, and now make the following dispositions of the same:

First of all, I would commend my soul into the hands of my Redeeming God, to be washed of all its stains and defilements in His most precious Atoning Blood, I commit my body also to Him who is the Resurrection and the Life, to be re-animated in due season and made glorious for eternity.

I confirm, to my dear wife Amelia Martha, the sum of four thousand two hundred pounds currency of said Province, payable to her according to the terms of a certain deed or contract of marriage, made and executed in the City of Montreal, on 24th day of March 1835, before N. B. Doucet and colleague, Public Notaries, and I direct that the said sum shall be paid with my stock in the funds of the Company of the Bank of England standing in the name of William Plenderleath or William Plenderleath Christie; and with all and every my personal property, until the amount of the said sum shall be fully and entirely paid and liquidated.

Also, I give and bequeath to my said wife, Amelia Martha, all and every my plate, household goods and other furniture, being in my house called Clifton Lodge, situated in Water Street in said City of Montreal, and in the outbuildings thereof, at my decease.

I give, devise and bequeath to Amelia Robertson, daughter of Katherine Robertson of said City of Montreal, widow, to be enjoyed by the said Amelia

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. — *continued.*

Robertson during her natural life, and after her decease to be the property of her child or children born in legal wedlock, my said house called Clifton Lodge if unsold at or before my decease with all and every the outbuildings and appurtenances thereof, together with the cottage and garden opposite to said Clifton Lodge, if said cottage and garden or any part thereof, are not sold at or before my decease, and I desire, if the said Amelia Robertson should die without such child or children, that all and every the said hereinbefore to her devised premises, or any part thereof which may be unsold at or before my decease, shall, after the death of her mother be sold, and the clear proceeds of the sale shall be applied and paid in four equal parts by my executors hereinafter named and appointed, to the funds of the Newfoundland and British North America School Society, Colonial Church Society, London Society for promoting Christianity among the Jews, and Church Missionary Society, all established in London.

I give, devise and bequeath to my said wife, Amelia Martha, during her natural life, and after her decease to my child or children share and share alike, my dwelling house called Springfield, situated at Christieville aforesaid, and the outbuildings thereof, and the farm house now occupied by Joseph Gibson, and every the plate, household goods and furniture within said dwelling house and its outbuildings, together with all and every the ground, fields and premises thereof, of which I may be possessed at my decease, contained and being between the mouth of Hazen Creek and the board-paling near the grist mill at Christieville, bounded on the east by Napier street, on the west by the River Richelieu, also all and every the tract of land except the reservations hereinafter mentioned, of which I may be possessed at my decease, in the rear of the dwelling house of the Honorable Robert Jones, which said tract includes part of Hazen Creek, bounded on the north by the fence of Mr. Demers, and runs east towards the second concession line of Bleury Seigniory, and on the south, and west, and east is fenced in with cedar logs; said tract contains one hundred and fifty arpents of lands more or less.

I hereby reserve and except from and out of the said devised tract of land six arpents of land near the said grist mill and Demers' fence, which six arpents I give to William McGinnis, Esq., of said Christieville, his heirs and assigns, also I reserve and except all the ground, on which Trinity Church and its school-room in said Christieville stand, together with its enclosed burying ground adjoining, all lying within about two arpents of land marked C.G. on large stones at the four angles, to denote church ground, another reservation and exception I make is the vacant space or area in front of said church and lying between said church ground and Hazen Creek on the south and between the entrance gate from Manor street on the west, and the rail fence on the east; It is my will that the said vacant space shall be always kept as ornamental ground under the direction of the clergyman of said church but not to be considered as church property. The road from Manor street shall always be kept open to the church, and no building shall ever be erected on any part of the said vacant space or area.

I give, devise and bequeath to my child or children by my said wife Amelia Martha share and share alike my large stone house and premises with all the appurtenances thereof, situated and being in St. Paul street in said City

of Montreal, adjoining Trinity Church and now leased to Mr. John Mack; in the event of my leaving no such child or of his or her death under age, I direct that the said large stone house and premises shall be sold on the following conditions and the clear proceeds of the sale thereof shall be equally divided between the Prayer Book and Homily Society, and the Reformation Society, both in London, the conditions are that no manufactory or factory, tavern or house of public entertainment shall ever be carried on in said stone house; and no building shall ever be erected in the place thereof or any part of the lot belonging thereto so as to endanger the said church; or prove a nuisance to those who frequent it, an extract of this shall be deposited among the records of said church.

I give, devise and bequeath to my said wife Amelia Martha, during her natural life and after her decease to my child or children by her, share and share alike, all and every the tract, part or parcel of land called and known as the Seigniory Bleury in said Province of Canada, save and except the reservations hereafter mentioned, with all and every the terriers, books, papers and maps to the said Seigniory Bleury belonging; but this gift, devise and bequest is made on condition that my said wife and my said child or children after her shall supply out of the revenues of said Seigniory Bleury the following sums, year by year, to be paid to the managers or churchwardens of Trinity Church, Christieville, viz:—for the minister's salary fifty pounds currency per annum as long as he shall officiate in Christieville and St. John's conjointly, and whenever he shall do duty in Christieville separately from St. John's one hundred and fifty pounds currency per annum as stipend; a further sum of fifty pounds currency per annum to the managers or churchwardens for the current expenses of said church, and for repairs and improvements; also a further sum of fifty pounds cy. per annum for the schoolmistress, or master, and the expenses of the school which is to be under the control of the clergyman of said church. In the event of my leaving no child, or of his or her dying under age, I desire that the said Seigniory Bleury, save and except the reservations hereinafter mentioned shall belong to and be at the sole disposal of my said wife Amelia Martha, but always subject to the aforesaid conditions of annual payments to be made by her, or secured by her, in case of her sale of the said seigniory to the managers, or churchwardens of said church and school amounting altogether to two hundred and fifty pounds currency per annum, also on the further condition of the said church and school being supplied from the domain with firewood and whatever timber or other wood may be required for the use and repairs or improvements of the church and school aforesaid, and moreover should the Seigniory Bleury, except the reservations hereinafter mentioned, be sold, the purchaser shall be bound to furnish the said required firewood, timber or other wood from the domain free of costs.

In the event of my said wife Amelia Martha's decease without having sold the said Seigniory Bleury, or Springfield, and its outbuildings, grounds, fields and farm before described or other buildings, lots or farms which have been purchased by me in said Seigniory or in any other of my Seignories (the reservations hereinafter mentioned always excepted) it is my desire that if all the aforesaid or any part thereof shall be unsold at the time of her decease, the

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. — *continued.*

same shall then be sold, and the proceeds of each shall be equally divided among the Colonial Church Society, Reformation Society, Pastoral Aid Society, Protestant Association, Prayer Book and Homily Society, Society for promoting Christianity among the Jews, Church Missionary Society, Irish Society for teaching in their own tongue, all of London; care being first taken to place in good securities part of the proceeds of said Bleury Seigniory to the amount of two hundred and fifty pounds currency per annum as a permanent provision for the church and school aforesaid, besides the fuel, timber and wood for repairs and improvements, free of costs.

The house and lot now occupied by the Reverend Wm. Dawes shall continue to be the Parsonage house, until one shall be erected on the church grounds, when said house shall merge into the number of buildings purchased and placed at the disposal of my said wife.

Any French Protestant teachers who may be in my employ at the time of my decease, shall be continued at the discretion of my said wife; and while continued, supported by her out of the revenue of Bleury Seigniory aforesaid.

The reservations in Bleury Seigniory aforesaid, are: 1. the Grist Mill at Christieville and the piece of ground for wood yard between the said mill and the board fence. 2. Six arperts of land near Grist Mill and Demers' fence aforesaid. 3. All the Church ground marked C. G. aforesaid. 4. The vacant space or area in front of Trinity Church aforesaid. 5. Springfield, and its appurtenances. 6. All purchased farms and lots, I remit to Richard and William McGinnis any rent that may be due by them at the time of my decease for their lease of the site on which the Grist Mill at Christieville stands; and I offer to them, if I should leave a child to retain the said Grist Mill, after the expiration of their lease, on a yearly payment to my said child of one-third part of the clear annual profits of said mill; but if I leave no child at my decease, I give, devise and bequeath the Grist Mill site, Grist Mill and Wood Yard aforesaid, to the said Richard and William McGinnis, share and share alike, in full enjoyment for themselves, their heirs and assigns.

I further give to my said child my lands on the left bank of the Richelieu River, near St John's, called Fort farm and Richelieu Hamlet, and in default of such child, I give said Fort farm to Alexander Walmsley, son of Mrs. Wakefield, and to his children after him; and I give said Richelieu Hamlet to Alexander Montgomerie, eldest son of Mrs. Jane Montgomerie, widow, of Montreal, and to his children after him; and in default thereof, I give said Richelieu Hamlet to his brother Richard, and to his children after him; and in default thereof, to my godson, Colborne McGinnis, should said Alexander Walmsley die without leaving a child, I give said Fort farm to the eldest son of William McGinnis of Christieville, and to his children after him; and in default thereof to his brother Robert, and to his children after him.

I give, devise and bequeath in full property to the eldest son existing at my decease of David Gordon, the natural son of Lieutenant-General Gabriel Gordon, and to the heirs and assigns of the said eldest son for ever, all and every part or parcel of land called and known as the Seigniory Repentigny, situated and being in the said Province of Canada, and all and every the terriers, books, papers and maps thereto belonging, together with a lot and parcel of land

in the said Seigniory and called the Domain, being about half an arpent in front with the depth thereof, and ten arpents in superficies, or thereabouts, at or near the village of Repentigny in the said Seigniory, if the said lot of land be unsold at my decease.

I give, devise and bequeath to the said Katherine Robertson of Montreal, widow, during her natural life, and after her decease 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 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 of Canada, save and except the reservations hereinafter mentioned; and all and every the terriers, books, papers and maps belonging to said Seigniory DeLery, or concerning another Seigniory called Chazy, situated in the United States of North America; and further, all and every the annual rent payable by the heirs and assigns of the late Edmond Henry, of Laprairie, for the Mills of Napierville in the said Seigniory DeLery, together with all papers and documents relating to the said rent, 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 called and known as the Seigniory DeLery, save and except the reservations hereinafter mentioned, 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 called the Seigniory DeLery, the reservations hereinafter mentioned always excepted, shall be sold and the clear proceeds thereof shall be equally divided among the Prayer-book and Homily Society, the Reformation Society, the Protestant Association, and the Lord's Day Society, all of London.

And whereas, I have made certain reservations in said tract of land called DeLery Seigniory, I do hereby declare that they are as follows: 1.—The Domain and the ground lately covered by the well known little lake. 2.—One hundred arpents of land, if so much remain unconceded at the time of my decease, at and near the village of Napierville, and including the parcel of a few arpents near the school house in said village. 3.—My newly erected Saw Mill, with about four arpents of land adjoining, which said reservations I dispose of as follows: I give, devise and bequeath the Domain and the ground lately covered by the little lake aforesaid, the exact bounds of which I desire may be surveyed and marked under the direction of Richard and William McGinnis, esquires, aforesaid, to my said wife, Amelia Martha, in trust for the purpose of forming a Waldensian settlement, and she is authorized to pay out of the rents of said settlement a sum not exceeding one hundred and fifty pounds currency per annum for the stipend of its pastor, and fifty pounds currency per annum for the salary of its school-master, and if there shall be a balance of rent, after making said payments, she may apply it at her discretion for their Church or a Protestant French Minor College or School for training up in said settlement French Protestant Ministers and Teachers, and for their support. If no Wal-

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. *—continued.*

densian settlement is practicable I direct my said wife Amelia Martha to form a settlement of loyal and respectable members of the Church of England, and to pay out of the rents thereof one hundred and fifty pounds currency per annum for the stipend of a resident clergyman, and fifty pounds currency per annum for the salary of a resident school-master, distinct from the clergyman, and should their remain a balance of rent she may apply the same to be benefit of said settlement or to other charitable objects at her option. If the said clergyman and school-master are paid out of the rent of the English settlement, I devise the patronage to the Colonial Church Society of London; any surplus of Domain land which may remain after the Waldensian or English settlement is formed shall constitute an augmentation of the settlement out of which augmentation from fifty to one hundred acres shall be allotted to the Waldensian or English minister as a glebe, and the remainder, if any, applied either to the extension of the settlement or to the increase of the fund disposable at the discretion of my said wife.

I give, devise and bequeath, in trust, to the Right Reverend Bishop of Montreal Dr. Mountain, or to the Bishop administering the Protestant see of Quebec, the one hundred arpents of lands before described, at and near Napierville, also to be surveyed and marked for the erection of an English Protestant Episcopal Church and School, and for the glebe of the minister thereof, if these lands are not given before my death; I give, devise and bequeath the said Saw Mill, and the about four arpents of land adjoining aforesaid, to William B. McGinnis, son of the late John McGinnis, and after him to his children born in lawful wedlock share and share alike in full property, but in the event of the death of the said William B. McGinnis without leaving such child, then I desire that the said Saw Mill and the above four arpents of land adjoining shall go and belong to the third son of William McGinnis, of Christieville, named Colborne, and after him to his lawful children in equal shares; and in default of such child, to the eldest son of said William McGinnis, and after him to his lawful children in equal shares, and in default of such child, to Robert the second son of said William McGinnis, and after him to his lawful children in equal shares.

I give, devise and bequeath to the two sons of the late Reverend James Tunstall, and to his grandson Gabriel Tunstall the younger, during their natural life share and share alike and afterwards to their lawful children respectively and in equal shares, all and every the tract part and parcel of land in said Province of Canada called and known as the Seigniory Beaujeu or Lacolle, with all and every the terriers, books, papers, and maps thereto belonging, save and except the mill privileges of said Seigniory Beaujeu or Lacolle, and in the event of the said two sons and the grandson dying without leaving such children aforesaid, I desire that the said tract of land and Seigniory Beaujeu or Lacolle, save and except the mill privileges aforesaid shall be sold and the clear proceeds shall be equally divided among the Irish Society of London for teaching in the Irish tongue, the Achill Mission, the Connemard Mission, and the Society of Friends of the Hebrew Nation; I further desire that whatever piece of land in Hemmingford township, may be purchased of Mrs. Mountain of Cornwall, or of others, contiguous to said Seigniory Beaujeu or Lacolle shall be considered as a part and augmentation of said Seigniory Beaujeu or Lacolle.

I give, devise and bequeath to Mrs. Mary C. Hamer, younger daughter of the late General Napier Christie Burton during her natural life, and afterwards to her children, born in lawful wedlock, share and share alike, all and every the tract, part or parcel of land in said Province of Canada, called and known as the Seigniory of Noyan, with all and every the Terriers, Books, Papers, and Maps to the same belonging, reserving and excepting from said Seigniory Noyan the mill priviliges of said Seigniory Noyan, also reserving and excepting the half lot in the village of Henryville contiguous to the other half lot, on which the School-room stands, the said vacant half lot is designed for a Church belonging to the Church of England, if not so applied during my life, I give the same in trust, to the Bishop administering the Protestant See of Quebec, my further intention is that in the event of the said Mary C. Hamer dying without leaving such children as aforesaid, or of their dying under age, the said tract part or parcel of land called Noyan Seigniory except the reservations of the mill privillges thereof and the said vacant half lot in Henryville shall be sold, and the clear proceeds of the sale shall be equally divided among the London Society for promoting Christianity among the Jews, the Church Missionary Society, the Pastoral Aid Society of London, and the Sunday School Society for Ireland.

I give, devise and bequeath to Mrs Cleather, daughter of Lieutenant-General Gabriel Gordon during her natural life; and after her decease to her eldest son, all and every the tract part or parcel of land called and known as the Seigniory Sabrevois in said Province of Canada, with all and every the terriers, books, papers, and maps to the same belonging, and in the event of the decease of the said eldest son without leaving lawful children, or of their dying under age, the said tract of land called Sabrevois Seigniory shall go to the said Mrs. Cleather's second son, and in like manner in case of his death without leaving lawful children or of their dying under age, the same shall go to her third son: and so on through all the sons of the said Mrs. Cleather; and I further direct that if all of her sons shall die before the age of twenty-one years without leaving a lawful child or children the said Seigniory Sabrevois shall be sold, and the clear proceeds thereof shall be equally divided among the British Church of England Tract Society, the Female Mission Society of London, the Reformation Society, and the Prayer Book and Homily Society; the two last before mentioned.

I desire that my farm called Hopeland situated and being at or near Cornwall in western part of Canada, if it is not sold at my decease shall be sold, and the clear proceeds thereof divided share and share alike among Jane Montgomerie, Mary E. Wakfield, Sarah McGinnis and Eliza McGinnis.

I further desire, that a certain registered tract or grant of land situated and being near Sherbrooke in Eastern Townships and consisting of twelve hundred acres altogether, if not disposed of at my decease, shall be put in trust of the Bishop administering the Protestant See of Quebec, for the advancement of true religion in that part of Canada, lately called Lower Canada, either by sale or lease in whole or in part, as his Lordship shall judge most advantageous.

I further give, devise and bequeath to Jane Montgomerie, Mary E. Wakefield, Sarah McGinnis, and Eliza McGinnis, share and share alike, my ten shares in the British North America Land Company, with all the interest due thereon.

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. — *continued.*

I give, devise and bequeath to the three sisters of my said wife Amelia Martha, namely Caroline Shortt, Martha King, and Octavia Bowman, share and share alike, seven shares in the Bank of Montreal, with all interest due thereon, and I direct that the dividends and profits of the remaining forty-nine shares in said Bank, standing in my name, and vested for the benefit of the following persons shall be regularly received and paid by my executors hereinafter named until the several parties shall be put in possession of their respective shares under their own names and according to the will of the late Mary Massy, dated 11th March, 1836, viz; Jane Montgomerie, Sarah Scofield, Mary E. Wakefield, Sarah McGinnis, Eliza McGinnis; each of these nine shares, equal to four hundred and fifty pounds currency, each person besides Wiliam B. McGinnis of L'Acadie, a minor, four shares equal to two hundred pounds currency.

I direct that my said wife Amelia Martha shall receive and apply to the benefit of Charles Darly until he is of age, the dividends and profits of six shares or one hundred and fifty pounds currency in the City Bank; and standing in the name of said Charles Darly; and further, that she shall take the oversight of said Charles Darly during his minority.

I give, devise and bequeath to Jane Montgomerie, Mary E. Wakefield, Sarah McGinnis and Eliza McGinnis aforesaid, and to their children respectively, all and every the debt due to me by the said Richard and William McGinnis amounting to the sum of seven hundred pounds currency or such part thereof as may remain unpaid and due to me at my decease, which said debt or any part thereof as aforesaid, I direct shall be paid by the said Richard and William McGinnis within five years after my decease, in equal shares to the said devisees or to their children respectively in equal shares, together with all legal interest accuring on said capital sum; I further give to the faid four named devisees share and share alike, and to their children respectively in equal shares, one hundred and fifty pounds currency or such part thereof as may remain unpaid and due at my decease by the said Richard McGinnis, which said sum of one hundred and fifty pounds currency, or any part thereof as aforesaid, I direct shall be paid to the four devisees aforesaid, or to their children respectively within five years after my decease, with all legal interest accuring on said capital sum; I further desire that the sums of one thousand three hundred and fifty pounds, and of three hundred pounds currency, now in the hand of the Honorable Samuel Hatt of Chambly, at interest, shall both be paid together with all interest due thereon to my said wife Amelia Martha her heirs, and assigns after the decease of Mrs. Katherine Robertson of Montreal, widow, agreeably to two notarial documents in my possession, the Honorable Samuel Hatt aforesaid, or his heirs and assigns, shall also pay to my said wife Amelia Martha whatever interest may accrue on said sums between the period of my decease and that of Mrs. Katherine Robertson aforesaid.

I direct that my two Pews in each of the Churches in Montreal and Christieville called Trinity shall be at the disposal of my said wife Amelia Martha during her life or as long as she continues a resident at Christieville or Montreal; but that after her decease or removal from Canada, the said Pews in both Churches aforesaid shall revert to the two Churches for the increase of their funds respectively.

I give, devise and bequeath to the Colonial Church Society of London, or, in case of its dissolution, to the Newfoundland and British North America Society, the perpetual patronage and appointment of the Ministers of Trinity Church in Montreal, and of Trinity Church in Christieville, whenever the incumbency shall become vacant.

I further direct that from and out the arrears of my seigniorial dues, which may be owing to me at my decease, there shall be paid to the English Hospital in Montreal fifty pounds currency, to the Benevolent Society in said City twenty-five pounds currency, to the Church of England French Canadian Missionary Society in said City twenty-five pounds currency.

Also, fifty pounds currency to each of the several persons and societies hereafter named with certain exceptions when more than one are included together, so far as the collection of the said Seigniorial dues shall extend; and according to the order in which each name and designation stand, viz. to Katherine Robertson, Mary Robertson, Amelia Robertson, Mary E. Tunstall, to the children of James Tunstall, among them all; fifty pounds currency to Gabriel Tunstall senior, to Gabriel Tunstall junior, to Miss Hall of Montreal, known to Amelia Robertson, to Mrs. Forbes of Sabrevois, to Miss Christie of Woolwick, to Mrs. Mary C. Hamer, to Jane Montgomerie, to Mary E Wakefield, to Sarah McGinnis, to Eliza McGinnis, to Colborne McGinnis, to Caroline Shortt, to Martha King, to Octavia Bowman, to Mr. and Mrs. Murray together fifty pounds currency, to Mrs. Kelly late of 24th Regiment, to Richard McGinnis, esquire of L'Acadie, to William McGinnis, esquire of Christieville, to Charles Bowman, esquire, Nova Scotia; to William Bowman, esquire, Nova Scotia; to Jeffrey Hale, esquire, Quebec; to Rev. Thomas Sims, Winchester; to Beaumont Byers, son of Rev. S. Byers, Kensington; to T. Durbin Brice, near Bristol, England; to Mary and Elizabeth, daughters of John Gray, esquire, Lower Crescent Clifton, England, together fifty pounds currency; G. W. T Atkinson, to Rev. Mark Willoughly, to Rev. William Dawes, to the London Society's Hebrew Mission at Jerusalem, to Church Missionary Society, to the Prayerbook and Homily Society, to the Reformation Society, to the Lord's Day Society, to the Pastoral Aid Society of London, to the British and Foreign Bible Society, to the Trinitarian Bible Society, to the Connemara Mission, to the Archile Mission, to the Irish Society for teaching in their own tongue, to the British Church Tract Society, to the Kildare Place Society, to the Sunday School Society for Ireland, to the Protestant Association of London, to the London Female Mission, to the Colonial Church Society, to the Newfoundland and British North America Society, to the Society of Friends of Hebrew Nation; and, moreover, I desire, that if any surplus of seignioral dues aforesaid shall remain, after payment of the several just before mentioned sums of twenty-five pounds currency, and fifty pounds currency, the said surplus shall be equally divided among the following ten societies aforesaid, viz: London Society for promoting Christianity among the Jews, Church Missionary Society, Prayerbook and Homily Society, Reformation Society, The Lord's Day Society, Protestant Association, Pastoral Aid Society, London Female Mission, Newfoundland and British North America Society, and Colonial Church Society.

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. — *continued.*

I request that Richard and William McGinnis aforesaid, will collect the said seignioral arrears and dues without further remuneration, only deducting the expenses of collecting the same from the amount collected; and whenever their net collections make up fifty pounds, I wish the same to be paid over to my Executors hereinafter named, who are authorized to settle with each individual and society aforesaid with all convenient speed, until all and every the arrears of *cens et rentes, lods et ventes*, or other seignioral dues owing to me at my decease shall have been gathered and applied as aforesaid.

I expressly direct that all and every the bequests hereinbefore contained, the enjoyment of which is limited to the said devisees during their natural life, shall not nor may be in any manner charged or incumbered by the said devisees, or either or any of them, for the payment of or the security for any sum or sums of money whatsoever due or owing, or otherwise by the said devisees, or either of them, and shall not be liable or chargeable in any manner or way for the payment or security of any such sum or sums of money, and shall not be in any manner or way alienated by the said devisees or either or any of them, in any manner or way whatsoever.

I likewise expressly direct that if any person or persons mentioned in this my last Will and Testament, and a devisee or legatee, or devisees or legatees, under this said last Will and Testament, shall set up or make any opposition to this my said last Will and Testament, or to any part thereof, or to the legacies, divisees or bequests therein contained, or to any part or portion of the same, such person or persons shall forfeit all his, her or their right and interest under this my said last Will and Testament, and the said right or interest, or the amount thereof, shall, if required, be applied to meet and contest such opposition, and the surplus thereof, if any, shall fall into and form part and parcel of the residue of my estate.

And my will and intention also is, that all and every bequest out of my real or personal estate shall in no wise be liable to the control of any husband or husbands.

I give, devise and bequest all and every the rest, residue and remainder of my said estate unto my wife Amelia Martha aforesaid, during her natural life, and after her decease, to the children issue of our marriage, charging my said wife with the payment of my funeral expenses, and other my just debts; and my Executors hereinafter mentioned are authorized to withhold, if necessary, a sufficient portion of the Seignioral arrears and dues for the payment of the legal charges or costs which have been or may be brought against my estate by any opponent, until the said legal charges or costs shall have been liquidated and paid off.

Lastly. I hereby nominate, constitute and appoint my dear said wife Amelia Martha, Richard McGinnis, Esq're, of DeLery Seigniory, Wm. McGinnis, Esq're, of Christieville, Charles Bowman, Esq're, and William Bowman, Esq're, brothers of my said wife; Jeffrey Hale, Esq're, of Quebec, and the survivor or survivors of them, to be the Executors of this my said last Will and Testament, hereby expressly extending and prolonging the time for the perfect execution hereof beyond the period limited of a year and day according to the law of the custom of Paris, at present in force in this part of the Province of Canada.

In testimony of all which I have hereunto set my hand and seal this seventeenth day of March, in the year of our Lord, one thousand eight hundred and forty-two, at Christieville, in the said Province of Canada.

(Signed) W. P. CHRISTIE. [L. S.]

Signed, sealed, published and declared by the said Testator as and for his last Will and Testament, in presence of us, who, at his request, and in his presence and in the presence of each other, subscribed our names as witnesses thereto.

(Signed) W. MCGINNIS,
" ORANGE TYLER.
" JAMES KERNS.
" JAMES KEARNS.

Codicil to my Last Will and Testament, dated 17th March, 1842:

BLEURY SEIGNIORY.

Having conceded to the Protestant Bishop of Montreal, and his successors, the Church Ground, on which Trinity Church stands at Christieville, including the piece from the gate in Manor Street, bounded by Hazen Creek; what refers to the vacant space, or area, in said Will is therefore now cancelled.

It is to be understood that the stipend of the clergyman of said Church, fixed at £ one hundred and fifty cy., though secured on the rents of the Seigniory Bleury, is to be paid first from the proceeds of the pews, and the sales of cemetery lots; also, by the fifty pounds cy. which are payable in two instalments of twenty-five pounds cy. each on the 1st April, and 1st October of each year by the said Bishop and his successors, according to a deed of conveyance executed on 7 March, 1843, between his Lordship and myself, before J. Gibb, esquire, Public Notary and colleague, of Montreal.

The wood Domain of Christieville having been conceded together with Springfield, and its grounds, and the farm near the said Church; the said Church and its School shall not now be supplied with wood or timber from said Domain.

With regard to the sum of fifty pounds cy. allowed for yearly expenses of said Church, it is not my will that that sum shall be paid to the full amount, if the expenses do not reach it, but that if a lesser sum shall cover the necessary charges, that only shall be paid.

The Grist Mill and Mill Yard at Christieville with an additional piece of land below the mill along the river Richelieu having been conceded by me, what concerns the disposal thereof in my last will is hereby cancelled.

In the event of the decease of my dear said wife Amelia Martha before me, I give (if she shall leave no child) the Seigniory Bleury, except the reservations mentioned in my last will and under all the conditions in reference to said Seigniory, to her brother William Bowman, Esq., of Nova Scotia.

MONEY IN MESSRS. HATT'S HANDS AND STOCK IN ENGLAND.

I give to Amelia Robertson, in case of my said wife's death before me, without leaving a child, and to said Amelia Robertson's children in equal shares

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. —*continued.*

thirteen hundred and fifty pounds cy. in the hands of Messrs. Hatts of Chambly, together with the interest thereof, and the remaining three hundred pounds currency in the same hands and interest thereof, I give to Elizabeth Tunstall and to her children after her in equal shares, also, in case of my said wife's death before me I give to Mrs. Katherine Robertson during her life the Dividends of all my stock in the 3 per cents reduced and 3 per cent. Consols Government securities of England, and after the death of the said Mrs. Kathrine Robertson, I desire (if no child of my marriage shall survive) that the said Stock may go to and belong to the surviving sisters of my said wife in equal shares, and in case of the death of my said wife before me, without leaving a child, that my twelve hundred pounds Bank of England stock be given as follows: to Jane Montgomerie and her children after her in equal shares three hundred pounds stock, to Mary E. Wakefield and her children after her in equal shares three hundred pounds stock, to Sarah McGinnis and her children after her in equal shares three hundred pounds stock, to Eliza McGinnis and her children after her in equal shares three hundred pounds stock.

REPENTIGNY SEIGNIORY.

The lot and parcel of land, called the Domain in this Seigniory of about ten arpents in superficies which is mentioned in my said last will, I now desire shall be made over to the Protestant Bishop administering the See of Quebec, and his successors, for a Protestant Episcopal Church and School and for the promotion of the Gospel in East Canada, according to the doctrine and model of the Church of England.

DELERY SEIGNIORY.

I have conceded the reservations, No. 1 and No. 2, both which are referred to in my said last will. Though the number of arpents conceded to the Bishop of Montreal, in No 2, may not amount to 100, no addition is necessary.

A second Saw Mill having been built near the one devised to Wm. B. McGinnis of L'Acadie, I now give and bequeath the one last built to his brother Alexander McGinnis, and after him to his children in lawful wedlock, share and share alike, and in the event of the death of the said Alexander McGinnis, without leaving such child, then I desire that the said second Saw Mill shall go and belong to the eldest son of William McGinnis of Christieville, and after him to his lawful children in equal shares, and in default of such child to his brother Robert and his lawful children, in equal shares, and in default thereof to his brother Colborne and his lawful children, in equal shares.

BEAUJEU, OR LACOLLE SEIGNIORY.

Provision having been made in my said last will, in the event of the sale of this Seigniory, that the proceeds thereof shall be divided among certain societies, I now except the Connemara Mission because no account can be obtained of its existence.

HOPELAND FARM, CORNWALL.

Whereas, I have directed in my said last will, that this farm, if not sold at my decease, shall be sold for the benefit of four person named in my said will,

I now desire to add to the provise—if it is not sold at my decease this or if it is not used for an Indian school—it shall be sold according to the intention expressed in my said last will.

MONTREAL BANK SHARES.

In my said last will I left seven shares to be divided among the three sisters of my wife Amelia Martha, I now give to them nine shares, instead of seven, of the remaining four, making in all thirteen, which belong to myself, I give two shares to said Alexander McGinnis, and two shares to his brother William B. McGinnis.

NOYAN SEIGNIORY.

What is called in my said last will a half lot in Henryville Village, proves to be about three and a half arpents, the residue of that on which the School House stands which is about half an arpent, the said three and a half arpents are now conceded.

PATRONAGE OF MY TWO CHURCHES.

This has been given to the Colonial Church Society of London, and in case of their dissolution, to the Newfoundland and British North America Society, and in case of the dissolution of this last, I devolve the patronage to the Church Missionary Society of London, and in case of their dissolution, to the London Society for promoting Christianity among the Jews.

SEIGNORIAL ARREARS.

I now omit in the application the following societies and persons mentioned in my said last Will: The Church of England French Canadian Missionary Society, the Connemara Mission, Rev'd Mark Willoughby, Rev'd Wm. Dawes.

BEAUJEU OR LACOLLE SEIGNIORY.

In case of my said wife Amelia Martha's death before me, I give the Grist Mill and its appurtenances, including the unconceded Domain land and Old Mill and site (if these are not sold before or at my decease) to the three sisters of my said wife Amelia Martha, shares alike, and all my purchased houses, farms, and lots in any of my six Seigniories, shall, together with the above mills, sites and land in this Seigniory (if not sold at the time of my death) be considered a part of the residue of my personal or real property.

Done at Christieville, East Canada, the eighteenth day of April, one thousand eight hundred and forty-three.

(Signed) W. P. CHRISTIE.

Witnesses:

(Signed) FREDERICK BROOME, Clerk.
" WM. DAWES, Clerk.
" WM. MCGINNIS.

Codicil to my last Will and Testament, which is left in charge of William McGinnis, my agent at Christieville, East Canada, bearing date April 7, 1843.

This Codicil is intended to cancel another which accompanies said last Will and Testament, the former Codicil being dated April 18, 1843. It is also

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. *—continued.*

intended to supply the place of the one cancelled, and is therefore to be annexed to my said last Will and Testament.

BLEURY SEIGNIORY.

As I have conceded to the Protestant Bishop of Montreal, and his successors, the ground on which Trinity Church, Christieville, stands, including a piece from the gate in Manor Street, bounded by Hazen Creek, whatever refers to the vacant space, or area, in said Will is now cancelled.

It is to be understood that the stipend of the clergyman of said Church, which is £150 currency, is endowed with nine hundred acres of land in the Township of Ascot; the title deeds of which are in the hands of Bishop Mountain or the Church Diocesan Society; and it is also endowed with the annual sum of fifty pounds currency, payable by the Bishop, and his successors, as administrator of the Temporalities of a chapel or church in the City of Montreal, according to the tenor of a Deed of Conveyance executed before J. Gibb, Notary, and colleague, of Montreal, said chapel or church in St. Paul Street, Montreal, being called Trinity.

The wood Domain of Christieville having been conceded together with Springfield and its grounds and farm, near the said church in Christieville, as wood or timber shall be furnished to the church or its school-room from said Domain, with regard to the sum of £50 currency allowed for yearly expenses of said church and school, I hereby revoke it.

The Grist Mill and mill-yard at Christieville, with an additional piece of land below the mill along the River Richelieu, having been conceded by me, what concerns the disposal thereof in my last Will is hereby cancelled.

In the event of the decease of my dear said wife Amelia Martha before me, I give (if she shall leave no child) the Seigniery Bleury to her brother William Bowman, Esq're, of Christieville, under all the conditions and reservations mentioned concerning said Seigniory in my said last Will.

I give to Amelia Robertson, in case of my said wife's death before me without leaving a child, and to said Amelia Robertson's children, in equal shares, thirteen hundred and fifty pounds currency, now in the hands of Messrs. Hatt of Chambly, together with the interest thereof, and the remaining three hundred pounds currency, in the same hands, and interest thereof, I give to M. Elizabeth Tunstall, and to her children after her, in equal shares.

In case of my said wife's death before me, I give to Mrs. Katherine Robertson during her life the dividends of all my stock in the 3 per cent. Reduced and 3 per cent. Consols, Government securities of England, and after the death of the said Mrs. Katherine Robertson, I devise, if no child of my marriage shall survive, that the said stock may go to and belong to the surviving sisters of my said wife in equal shares; and my £1200 Bank of England Stock, I give as follows, share alike, to Jane Montgomerie and her children after her, £300 Stock; to Mary E. Wakefield and her children after her £300 Stock; to Sarah McGinnis and her children after her £300 Stock; to Eliza McGinnis, and her children after her £300 Stock.

DELERY SEIGNIORY.

I have conceded the reservation No. 1 and No. 2, both which are referred to in my said last will. Though the number of arpents conceded to the Bishop

in No. 2 may not amount to 100, no addition is necessary, besides that matter is now finally adjusted.

A second Saw Mill having been built near the one devised to William B. McGinnis of l'Acadie. I now give and bequeath the one last built to the eldest son of William McGinnis of Christieville, and after him to his lawful children in equal shares, and in default of such child to his brother Robert and his lawful children in equal shares and in default thereof to his brother Colborne and his lawful children in equal shares.

BEAUJEU OR LACOLLE SEIGNIORY.

Provision having been made in my said last will, in the event of the sale of this Seigniory, that the proceeds thereof shall be divided among certain societies, I now except the Connemara Mission, because no account can be obtained of its existence.

MONTREAL BANK SHARES.

In my said last will I left seven shares to be divided among the three sisters of my wife Amelia Martha, I now give to them nine shares, instead of seven; the remaining four, making in all thirteen, which belong to myself, I give to William B. McGinnis.

NOYAN SEIGNIORY.

What is called in my said last will a half-lot in Henryville village proves to be about three and a half arpents the residue of that, on which the school-house stands, which is about half an arpent. The said $3\frac{1}{2}$ arpents are now conceded.

THE PATRONAGE OF MY TWO CHURCHES.

I hereby cancel my gift of the right of patronage of my said Churches, one in Montreal called Trinity, and the other in Christieville, called also Trinity Church, and both built at my sole expense; I say I cancel all that is stated in my said last will as to the patronage by religious societies, and now bequeath my said right to the following three Trustees, with full power to fill up any vacancy happening in their number by death, as soon as possible after the decease of any of the three persons hereinafter named so as to keep up the full number of Trustees, the great and sole object being to perpetuate sound and faithful doctrine according to the articles, homilies and other formulances of the Church of England in both said Churches. The three trustees which I now name, are Colonel Edward Paston Wilgress, of Lachine Grove, Jeffery Hale, Esq., of Quebec, and William McGinnis, Esq., of Christieville.

SEIGNIORIAL ARREARS.

I omit in the distribution of these the following societies and persons noted in my said last will:—the Church of England, French Canadian Missionary Society, the Connemara Mission, Rev. Mark Willoughby.

BEAUJEU OR LACOLLE SEIGNIORY.

In case of my said wife Amelia Martha's death before me, I give the Grist Mill and its appurtenances, including the unconceded Domain land, and old Mill

RECORD.

In the Superior Court.

No. 12. Last Will and Testament of William Plenderleath Christie, Esq., dated 31 March 1845 Opposants' exhibit No. 1. —*continued.*

and site, (if these are not sold before or at my decease) to the three said sisters of my said wife Amelia Martha, shares alike; and all my purchased houses, farms and lots in any of my six Seigniories, shall together with the above mentioned mills, sites and land, be considered a part of my personal or real property.

Written by my own hand, at Great Malvern, Worcestershire, this 31st of March, one thousand eight hundred and forty-five.

Witnesses. (Signed) W. P. CHRISTIE, (L.S.)

(Signed) FREDERIC GOOLD, CLK.
" GEORGE BRADSHAW.
" RICHARD ROGERS CORWELL.

I certify that a memorial of the foregoing document was entered and registered, in the Registry Office, for the County of Montreal, in Register A, Vol. 1, page 126, at half-past eleven o'clock in the forenoon, of the sixteenth day of March, one thousand eight hundred and forty-seven, under the number one hundred and forty-two. G. H. R.

HENRY WESTON,
Deputy Registrar.

We, the Prothonotary of the Court of Queen's Bench, in and for the district of Montreal, do hereby certify, that the foregoing last will and testament, and codicils of the said late William Plenderleath Christie, and the depositions of the witnesses, and the order of the Judge touching the probate, are true copies fro (*copy torn*) fyled and remaining of (*copy torn*) said Court (*copy torn*) we are the defendants.

Given at Montreal, this 19th June, 1845.

MONK, COFFIN & PAPINEAU,
P. C. B. R.

(On the back.)

A. Vol. 1.

I certify that such portions of this document as relate to bequests made to Dame Katherine Robertson, Maria and Amelia Robertson,——Elizabeth Tunstall of, and in rela——Estate situated in the County——Huntingdon were enregistered by Memo——Register A. Vol. 1., at twenty minutes past 1 p.m., on the 15th day of October, 1846.

W. F. HAWLEY, Depy. Regr.,
Co. Huntingdon.

(Endorsed.)

Last Will and Testament of William Plenderleath Christie, Probate, Copy.
Memorial No. 142. G. H. R.
Opposants' Exhibit No. One—Filed 11 May, 1894.
(Paraphed) D. G., D. P.

In the Superior Court.

No. 13. Last Will and Testament and Codicil of Miss Amelia Robertson, (Lighthall, N. P.) dated 8 October, 1879 and 5 February, 1891. Opposants' exhibit No. 2.

Schedule No. 11.

On this eighth day of October, in the year one thousand eight hundred and seventy-nine, at the special request of Miss Amelia Robertson, of the City of Montreal, in the Province of Quebec, spinster.

We, William F. Lighthall and Joachim Brossoit, Notaries Public, duly admitted and sworn, residing and practising in the said City of Montreal, in the said Province of Quebec, went to the residence of said Amelia Robertson, where finding her sick in body, but of sound mind, memory, judgment and understanding, knowing the uncertainty of life in view of death, hath requested us said Notaries to receive her Last Will and Testament, which she hath made, published and declared in manner form and words following, to wit:

First of all: As a Christian I commend my soul to Almighty God my Creator, praying for pardon and reception to Himself, through the sole infinite merits of my Divine Redeemer; and I desire that my dear friend, George F. C. Smith, esquire, conjointly with my Executrix hereinafter named, see my body decently buried, beside my late sister Mary in Mount Royal Cemetery, and that he, and my dear friend Doctor George Fenwick, be chief mourners, as they were for my said sister, and if alive, the same pall-bearers be requested to act, namely, Judge Badgley, J. Gibb, Reverends Doctor Leach and H. Roe."

Secondly. I desire that said Doctor Fenwick and his sons, take charge of our lot in the cemetery, to see that it always be kept in decent order or in any way disturbed, as far as they can prevent."

Thirdly. "I hereby will and bequeath to the Montreal Art Association, the Portraits in my possession known as the "Christie Portraits," being eight in number."

Fourthly. "As under Agreement passed before Mr. Lighthall, notary, in June last, with Mrs. Roe and her son, my estate is to receive over eight hundred pounds currency, I desire that all my lawful debts and funeral expenses, be first paid out of the same, for which I estimate two hundred pounds will be sufficient, or thereabouts; and I hereby will, devise and bequeath the balance as follows, to wit: To Dame Charlotte De Hertel, wife of Doctor George E. Fenwick, One hundred pounds; to said Doctor George E Fenwick, Fifty pounds; to each of their three children named Georgina, Joseph De Hertel, and Charles, Twenty-seven pounds; To said George F. C. Smith, One hundred pounds; To Maitland Smith, Twenty-seven pounds; and to Mrs. Eliza Mackenzie Smith, Twenty-five pounds; to Thomas P. Butler, esquire, advocate, Twenty-five pounds; to Mrs. Louisa Tunstall Warner, One hundred pounds; to William Warner, son of said Louisa Tunstall Warner, Twenty-seven pounds; to Susan Holmes, wife of William Curry, Twenty-five pounds; to Mrs. Best, Twenty-five pounds; and to my housemaid, Eliza O'Brien, Thirty pounds; and it is my desire, will and wish, that all the foregoing legacies be paid out of such moneys coming under such agreement, and only after payment of my said debts and funeral expenses therewith; and should there be any surplus, such surplus shall form part of my residuary estate; but, if on the contrary, such moneys so received under said agreement, after so paying my said debts

RECORD.

In the Superior Court.

No. 13. Last Will and Testament and Codicil of Miss Amelia Robertson, (Lighthall, N. P.) dated 8 October, 1879 and 5 February 1891. Opposants' exhibit No. 2. — *continued.*

and funeral expenses, be found insufficient to pay said legacies in full, that such legatees receive only their *pro rata* part '*au marc a la livre*,' in full for such legacies therewith."

Fifthly. "I also hereby will and bequeath to the said George F. C. Smith, the Silver Branch candlesticks and snuffers and stand, and the four Bottle stands; To Dame Laura Gough, wife of the said George F. C. Smith, the painted Miniature of my mother, to be kept by her and her heirs as an heirloom forever; To the said Eliza McKenzie Smith, the small Portrait of my father in uniform, to go to her son said George F. C. Smith after her death and his heirs; Also to her, the old Glass, we call "Mary's Glass," and which was my grandmother's, also Mary's old Writing Table; and my blue enamelled Brooch set with pearls; To the Reverend Henry Roe, the Book "Shakespear" given to my sister Mary by his sister, and which, I think, was his father's; To Fannie and Betsie Roe, daughters of the said Reverend H. Roe, two small Lockets with likenesses of their two aunts, one of which was given to me by their father, and the other by their grandmother; To my young friend David Leach, the framed likeness of his father, and the two pictures painted by his sister now Mrs. Howell; To Thomas Howell the framed likeness of his wife Jessie Leach, when she was a girl; To my young cousin and friend Miss Georgina Fenwick (daughter of the said Doctor George E. Fenwick and Charlotte De Hertel), my silver Teapot, Sugar holder and Cream Jug, also, my two Topaz Brooches, one with three stones, and one small one set round with diamonds, and all my fancy Books; To my young cousins and friends Joseph De Hertel Fenwick and Charles Fenwick, and my young friend Maitland Smith, all my Books not otherwise bequeathed, to be divided between them as they may agree upon; To my friend Thomas P. Butler, esquire, as a little remembrance of the many kindnesses he done for me and my late sister when in trouble, 'Milton's Paradise Lost,' the square Bible, and illuminated Prayer Book; To my servant maid Eliza O'Brien, the white marble Cross, and the picture of our Lord painted with the Crown of Thorns; the contents of her bed-room, and any other keep-sake she may desire."

Sixthly. "And as to all the rest and residue of my property, goods, chattels, rights and effects, including the Robertson Portraits, that of General Napier, and all other pictures, household furniture, fancy articles, linen, plate, plated ware, china and other effects, and every other matter and thing whatsoever I may die possessed of, I hereby will devise and bequeath the whole to the said Dame Charlotte De Hertel, wife of said Doctor George E. Fenwick, her heirs and assigns, as her and their own property for ever, hereby instituting her my sole residuary legatee in property."

Seventhly. "And in order to execute the present last Will and Testament I hereby name and appoint the said Dame Charlotte De Hertel and her before named husband Doctor George E. Fenwick, as the sole Executrix and Executor hereof, hereby authorizing her and him and the survivor of them, to act as such beyond the year and day till full execution hereof."

The foregoing last Will and Testament was thus made, dictated and declared by said Testatrix to said William F. Lighthall, one of the said notaries, in presence of the other of them, and after the same had been duly read over to her by him, in presence of the other notary, she did declare to well under-

stand the same, and to revoke, annul and make void, all other Wills, Testaments and Codicils she might have made, and to persist in these presents as containing here true Will and intentions.

Done and Passed at said City of Montreal, in the dwelling of said Testatrix, the day, month and year first before written, under number nine thousand six hundred and thirteen, and signed by said Testatrix with and in the presence of both of said notaries, after these presents were first and duly read.

(Signed) AMELIA ROBERTSON.
" J. BROSSOIT, N.P.
" WM. F. LIGHTHALL, N.P.

A true copy of the original hereof remaining of record in my office.

WM. F. LIGHTHALL, N.P.

And on this fifth day of February, in the year one thousand eight hundred and ninety-one.

At the special request of Miss Amelia Robertson, of the City of Montreal, in the Province of Quebec, spinster.

We, William F. Lighthall and Hugh Brodie, the undersigned Notaries Public, practising in the City of Montreal, in the Province of Quebec, went to the residence of the said Amelia Robertson, No. 224 Stanley Street, in said City, where finding her sick in body but of sound mind, memory, judgment and understanding, in view of death hath requested us, said Notaries, to receive a Codicil to her last Will and Testament, passed before said William F. Lighthall and his colleague Notaries, the eighth day of October, in the year one thousand eight hundred and seventy-nine, and hereunto annexed, and which Codicil she hath made, published and declared in form and words following, to wit:—

1. " I hereby revoke and cancel the legacy of one hundred pounds currency made in clause Thirdly of my said last will, to Louisa Tunstall Warner, and desire that in lieu thereof, fifty pounds thereof be paid over to Doctor Fenwick or his sons for the purpose mentioned in clause Secondly in my said will, and I should desire that they make arrangements with the Mount Royal Cemetery Company for the purposes therein expressed, and perpetual care thereof; and the other fifty pounds to go to Eliza O'Brien, my servant, subject to the conditions of said will and of these presents; and I hereby will and desire the said one hundred pounds be divided and applied as aforesaid."

2. " Should Mrs. Best, named in said clause Thirdly, pre-decease me, I in such case desire the twenty-five pounds bequeathed to her thereby, be added to the legacy therein made to Susan Holmes, wife of William Curry, and I hereby bequeath the same accordingly."

3. " I desire the bequest made in said Clause Thirdly, to Thomas P. Butler, esquire, advocate, of twenty-five pounds, be paid over to my said servant Eliza O'Brien, subject to the conditions of said will, and of these presents, in regard thereto, and I hereby bequeath the same accordingly."

4. " Eliza Mackenzie Smith, to whom, twenty-five pounds was bequeathed by said clause Thirdly, being deceased, I hereby will and bequeath said sum to my God-daughter Mary Massy, grand daughter of said Doctor Fenwick, and her heirs."

RECORD.

In the Superior Court.

No. 13. Last Will and Testament and Codicil of Miss Amelia Robertson, (Lighthall, N. P.) dated 8 October, 1879 and 5 February 1891. Opposants' exhibit No. 2. —*continued.*

5. "I hereby will and bequeath to my cousin, Charlotte De Hertel, wife of said Doctor Fenwick, the oil painting Portrait of my father in uniform, an old Looking-glass and frame known as Mary's glass, Mary's old Writing Table, and my blue enamelled Brooch set with pearls."

6. The foregoing legacies to the said Eliza O'Brien and Charlotte De Hertel, to be over and beyond all legacies and bequests, left to them in my said last will and testament."

7. And I hereby direct and will, that in case of the decease of my said servant-maid Eliza O'Brien, previous to having received the legacies mentioned and payable to her, by my said last Will and Testament, and by these presents or her having received but not having disposed of the same, previous to her decease, that the same shall be for the benefit of her niece Mary Winnifred O'Brien, who shall not however receive the same, until she arrives at the full age of twenty-one years, when all such, (her aunt being so previously deceased) shall be paid over to the said Mary Winnifred O'Brien in full property.

8. "And having heard my said last Will and Testament read over, and as changed by the present Codicil, I do hereby ratify and confirm the same to be followed and executed according to their form and tenor."

The present and foregoing Codicil was thus made, dictated and declared by the Testatrix to William F. Lighthall, one of said Notaries, and by him read over to her, in the presence of the other of them, she did declare to well understand and comprehend the same, and that it contains with said last will and testament as thereby changed, her true will and intentions."

Done and passed at said City of Montreal, in the said dwelling of said Testatrix, the day, month and year before herein before written, under number twelve thousand four hundred and forty-seven, of the *Notareat* of said William F. Lighthall, and signed by said Testatrix, with, and in presence of us said Notaries, who at her request, in her pressure, and in presence of each other have signed, after due reading hereof as aforesaid.

(Signed) AMELIA ROBERTSON.
" H. BRODIE, N. P.
" WM. F. LIGHTHALL. N.P.

A true copy of the original hereof remaining of record in my office.
WM. F. LIGHTHALL, N. P.

(On the back.)

No. 9613 9th Oct. 1879. Last will and testament of Miss Amelia Robertson. 3rd copy. No. 12447. 5th February, 1891. Codicil to above. 3rd copy. W. F. Lighthall, N. P.

(Endorsed.)

Opposants' Exhibit No. 2.—Filed 11th May, 1894.
(Paraphed) D. G., D. P.

No. 14. Certificate of death of Miss Mary Robertson, dated 10 September, 1891. Opposants' exhibit No. 3.

Schedule No. 12.

Mary Robertson, daughter of the late Col. Robertson of H. M. 60th Regt., died on the ninth day of October, one thousand eight hundred and seventy-six, and was buried on the eleventh day of the same month and year, aged seventy-six years and ten months.

Witnesses: T. DE H. FENWICK.
T. P. ROE.

By me,
(Signed) WM. BOND.

(Signed.)

I do hereby certify and attest, unto all whom it may concern, that what is written above is a true and faithful copy of an original entry in the Register of Baptisms, Marriages and Burials, of and for St. George's Church, of the Protestant Parish of Montreal, by me diligently compared and collated with the said original entry in the said Register, deposited of record in the said Church.

Given under my hand at the City of Montreal, this tenth day of September, in the year of our Lord Christ 1891 ninety-one.

JAS. CARMICHAEL,
Rector of St. George's Church, Montreal.

[SEAL.]

(Endorsed.)

Opposants' Exhibit No. Three. Filed 11 May, 1894.

(Paraphed) D. G., D. P.

No. 15. Certificate of death of Amelia Robertson, dated 22 May, 1894. Opposants' exhibit No. 4.

Schedule No. 13.

Province of Quebec, } Extract from the Register of the Acts of Baptisms,
District of Montreal. } Marriages and Burials, of St. George's Church, Church of England, in Montreal, for the year one thousand eight hundred and ninety-one.

Amelia Robertson daughter of the late Colonel Robertson of H. M. 60th Regiment, died on the eighth day of February in the year of our Lord one thousand eight hundred and ninety-one, aged eighty four years and was buried on the tenth day of the same month and year.

In the presence of (Signed) ALFRED G. ROE.
" NAPIER CHRISTIE.

By me (Signed) JAS. CARMICHAEL, Rector.
W. B. Montreal.

We, the undersigned, Deputy Prothonotary of the Superior Court for Lower Canada, in the District of Montreal, do hereby certify, that the foregoing is a true Extract from the Register of the Acts of Baptisms, Marriages and Burials of the said Church, in the said District. The said Register deposited in our office.

Given at Montreal, this twenty-second day of May, in the year of Our Lord one thousand eight hundred and ninety-four.

F. MIREAU,
D. P. C. S.

(On the Back.)

The 8th day of February, 1890. Extract of Death of Amelia Robertson.

(Endorsed.)

Opposants' Exhibit No. 4 at Enquête. Filed 11 mai, 1894.

(Paraphed) F. M., D. P.

RECORD.

Schedule No. 14.

In the Superior Court.

No. 16. Copy of Pleas in Cause No. 1460, S. C., M., D. C. de Hertel & al., Plffs. *vs.* A. E. Roe & al., Defts. dated 29 May, 1891. Opposants' exhibit No. 5.

Province de Québec, } Cour Supérieure.
District de Montréal, }

Dame C. de Hertel, & al., - - - - - Demandeurs.

vs.

Alfred E. Roe, & al., - - - - - Défendeurs.

Et les dits Défendeurs pour défense à l'action des dits Demandeurs alléguent et disent.

Qu'à l'exception de ce qui peut être ci-après admis, tous et chacun des allégués contenus dans la déclaration sont mal fondés en faits;

Que par son testament fait et passé le trente-un mars mil huit cent quarante-cinq (31 Mars 1845) en la forme Anglaise et dûment vérifié, feu Wm. Plenderleath Christie aurait entre autres dispositions fait le legs suivant, savoir :

" I give, devise and bequeath to the said Catherine Robertson of Montreal, " widow, during her natural life and after her decease to her daughters Mary " and Amelia Robertson and to her neice 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 Seigniory de Léry, situated and being the said " Province of Canada, save and except the reservations hereinafter mentioned, and " all and every Terriers, Books, Papers and Maps belonging to said Seigniory " De Léry, or concerning another Seigniory called Chazy situated in the United " States of North America; and further all and every the annual rent payable by " the heirs and assigns of the late Edmond Henry of Laprairie for the mills of " Napierville in the said Seigniory de Léry, together with all papers and docu- " ments relating to the said rent, 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 or parcel of land called and known as the " Seigniory de Léry save and except the reservations hereinafter mentioned, " shall go and belong to the child or children of the survivor in full and entire " property."

Que d'après les dispositions de ce testament le testateur aurait légué en Usufruit en premier lieu, en faveur de Dame Katherine Robertson sa vie durante et à son déces encore en Usufruit en faveur de Mary et Amelia Robertson, Mary Elizabeth Tunstall, la dite Défenderesse, conjointement par parts égales, leur vie durante l'immeuble ci-haut décrit; en propriété en faveur des enfants de chacun des dites légataires Mary Amélia Robertson et Mary E. Tunstall, la part que chacune d'elles avait reçue en Usufruit, et au cas du décès de deux des susdites trois légataires en dernier lieu mentionnées sans laisser d'enfants légitimes, le dit immeuble ci-haut décrit a été laissé en propriété aux enfants de la survivante des dites trois légataires;

Que la dite Katherine Robertson étant décédée les dites Mary Robertson et Amélia Robertson et Mary Elizabeth Tunstall ont été saisies du dit legs fait en leur faveur par le dit testament;

Que les dites Demoiselles Mary Robertson et Amélia Robertson sont toutes les deux décédées sans avoir contracté mariage;

Que la dite Mary Elizabeth Tunstall, la Défenderesse en cette cause est la seule qui ait contracté marriage, ayant pour enfant unique A. E. Roe le dit Défendeur;

Que la dite Mary Robertson est décédée il y a plusieurs années sans enfants en sorte que sa part en usufruit s'est trouvé être dévolue à sa sœur Amélia Robertson et à la Défenderesse Mary Elizabeth Tunstall en usufruit;

Que d'après les termes du testament par suite du décès des dites Mary Amélia Robertson la dite Seigneurie est dévolue en propriété au dit A. E. Roe;

Que la prétendue convention faite et passée le dix-huit Juin mil huit cent soixante-dix-neuf (18 Juin 1879) entre la dite Dame Amelia Robertson et les dits Défendeurs est nulle et de nul effet; attendu qu'elle a été consentie par erreur de la part des Défendeurs et sans cause legale de la part de la dite Amelia Robertson, la pretendue considération mentionée à la dite convention n'étant rien autre chose, que la cession même de la propriété absolue du dit Défendeur A. E. Roe qui, à tout évenement, au cas de prédécès de sa mère avant la dite Amelia Robertson, en vertu du testament même, aurait été saisi non seulement de la propriété, mais aussi de la jouissance de la part de la dite Seigneurie dont jouit sa mère, la dite Défenderesse;

Que par la dite convention, la dite Amelia Robertson n'a donné aucune considération possible et que le dit contrat est nul et de nul effet, et les dits Défendeurs n'y ont consenti que par erreur;

C'est pourquoi les dits Défendeurs concluent à ce que la dite convention du dix-huit juin mil huit cent soixante dix-neuf qui est la base de la présente action des dits Demandeurs soit déclarée avoir été consentie par erreur et sans consideration, et a ce qu'elle soit déclarée nulle et de nul effet, comme non avenue et à ce que la présente action des Demandeurs soit renvoyée avec depens et aussi avec depens des exhibits, dont distraction aux soussignés.

Montréal, 29 mai, 1891.

(Signé) JUDAH, BRANCHAUD & KAVANAGH,
Avts. des Défendeurs.

Et les dits Défendeurs pour défense au fonds en fait à l'action des dits Demandeurs, alléguent et disent que tous et chacun des allégués contenus dans la dite dèclaration sont mal fondés en fait;

Que les dits Défendeurs sont nullement endettés envers les dits Demandeurs pour aucune des raisons mentionées dans la dits déclaration, et les dits Défendeurs concluent à ce que l'action des dits Demandeurs soit déboutée avec dépens dont distraction aux soussignés.

Montréal, 29 mai, 1891.

(Vraie copie) (Signé) JUDAH, BRANCHAUD & KAVANAGH,
JUDAH, BRANCHAUD & KAVANAGH. Avts. des Défendeurs.
Avocats des Défendeurs.

On the back.)
Plaidoyers—copie.
(Endorsed.)
Opposants' Exhibit No. Five. Fyled 11 May, 1894.
(Paraphed) D. G., D. P. S. C.

RECORD.

In the Superior Court.

No. 17. Copy of Agreement &c. between Miss A. Robertson with Mrs. Mary Elizabeth Tunstall, widow of Edward Roe, (Lighthall, N. P.) dated 18 June, 1879. Opposants' exhibit No. 6.

Schedule No. 15.

On this eighteenth day of June, in the year one thousand eight hundred and seventy-nine.

Before me, William F. Lighthall, the undersigned Notary Public, duly admitted and sworn, residing and practicing in the City of Montreal, in the Province of Quebec.

Appeared Miss Amelia Robertson of the said City, spinster, *fille majeure*, of the first part;

Dame Elizabeth Mary Tunstall, of the same place, widow of the late Edward Roe, in his lifetime of same place, Esquire, of the second part;

And, Alfred Edward Roe, of the same place, Gentleman, of the third part;

Which said several parties declared to me said Notary, as follows:—

That the said Amelia Robertson, party hereto of the first part, and the said Elizabeth Mary Tunstall,party herto of the second part, are the sole surviving usufructuaries, and the said Alfred E. Roe, party hereto of the third part, (son of the said Mary Elizabeth Tunstall,) in the substitute, *grévé de substitution*, named and appointed, under the last Will and Testament of the late William Plenderleath Christie, Esquire, of the Seigniory of DeLery, in the County of Napierville, with the rights and privileges, lucratives and seigniorial to the same belonging, including the indemnity payable by the Government of the Dominion of Canada, respecting the same, and they said parties hereto of the first and second parts are, as such usufructuaries enjoying the rents and revenues of said Seigniory and the interest of such indemnity from the Government, equally, and they are desirous, on the one hand in case of death of the said Mary Elizabeth Tunstall, prior to that of the said Amelia Robertson, that the said Alfred Edward Roe should be provided for, till the death of said Miss Robertson, and on the other hand, that should the latter predecease said Mary Elizabeth Tunstall, that the estate of said Amelia Robertson should receive a certain amount or payment, and be relieved of any balance of a debt owing to the said Mary Elizabeth Tunstall.

And whereas, the said parties hereto have agreed, that in order to carry out such desires, that should the said Mary Elizabeth Tunstall, predecease the said Amelia Robertson, that the said Alfred Edward Roe should enjoy the same share of the said revenues and rights, as the said Mary Elizabeth Tunstall now enjoys, to wit: one equal half of the whole, until the decease of her the said Amelia Robertson, and that should the said Amelia Robertson, predecease her the said Mary Elizabeth Tunstall, that then and in such case, the latter should pay to the representatives of said Amelia Robertson, one years' revenues, to wit: eight hundred and eighteen pounds currency, as hereinafter mentioned, and the said Mary Elizabeth Tunstall should, in such case release her estate for any amount due the latter and then unpaid.

Wherefore, they the said parties hereto, do hereby mutually covenant, stipulate and agree to, and with each other as follows, to wit:

1st. That in case the said Amela Robertson, party of the first part, should survive the said Mary Elizabeth Tunstall, that then and in such case, from the

decease of the latter, and during the remainder of the life of the said Amelia Robertson, he, the said Alfred Edward Roe, party hereto of the third part, thereof accepting for himself and his heirs, shall be entitled to, and shall have the same part, to wit, one equal half of the revenues of the said Seigniory of DeLery, including Seignioral rents, interests upon Seignioral indemnity, and as such half is now enjoyed by the said Mary Elizabeth Tunstall; to have and to hold such equal half of said revenues and rights to the said Alfred Edward Roe, and his heirs as fully as the said Mary Elizabeth Tunstall holds and enjoys the same, from the time of her decease and until such substitution become fully open *ouvert* by law.

And, 2nd. And on the other part, and in case the said Mary Elizabeth Tunstall should survive the said Amelia Robertson, then and in such case, the said Mary Elizabeth Tunstall and Alfred Edward Roe, parties hereto of the second and third parts, hereby promise, bind and oblige themselves jointly and severally *solidairement*, one of them for the other and each of them for the whole, to pay to the legal representatives of the said Amelia Robertson, or whomsoever she may have appointed in that behalf to receive, the sum of eight hundred and eighteen pounds currency of Canada, as follows, to wit: one hundred pounds forthwith at and upon the decease of the said Amelia Robertson; one-half of the balance, three hundred and fifty-nine pounds, on the twentieth day of March, or twenty-eighth day of November, which ever may first arrive after the decease of the said Amelia Robertson; and the remaining three hundred and fifty-nine pounds, other half of the balance, on such twentieth day of March or twenty-eighth day of November, which may then next arrive after such decease, and which ever may arrive after the first half of the balance falls due.

3rd. The said Mary Elizabeth Tunstall, in consideration of the foregoing and present agreement, hereby also agrees to acquit, release and discharge the said representatives and the estate of said Amelia Robertson in case of her predecease, of any amount or indebtedness, the latter may owe her at the time of her death.

And, 4th. The said Amelia Robertson moreover consents and agrees that in case of her survivorship, that the said Alfred Edward Roe shall be and continue (as he now actually is) the agent for the receiving and getting of the said Seignioral rents, dues and revenues, during her said survivorship, or during her good pleasure, and which he shall continue as he hereby agrees to do, and pay over her half without commission or charge.

And for the execution hereof, said parties have elected their domicils at their actual residences, where, &c.

Done and passed, at said City of Montreal, in the office of said Notary, the day, month and year first before written, under number nine thousand five hundred and thirty-three, and signed by said parties appearers and Notary, after these presents were first duly read.

(Signed) A. ROBERTSON.
" E. M. ROE.
" ALFRED E. ROE.
" WM. F. LIGHTHALL, N. P.

RECORD.

In the Superior Court.

No. 17. Copy of Agreement &c. between Miss A. Robertson with Mrs. Mary Elizabeth Tunstall, widow of Edward Roe, (Lighthall, N. P.) dated 18 June, 1879. Opposants' exhibit No. 6. —*continued.*

A true copy of the original hereof remaining of record in my office
WM. F. LIGHTHALL, N. P.

(On the back.)

No. 9533. 18th June, 1879. Agreement &c. between Miss Amelia Robertson with Mrs. Mary Elizabeth Tunstall, widow of Edward Roe and Alfred Edward Roe. 3rd copy. Wm. F. Lighthall.

(Endorsed.)

Opposants' exhibit No. six at enquête,—Fyled 11th May, 1894.
(Paraphed) D. G., D. P.

Plaintiffs' Ex. No. 1 at enquête. Fyled 11 May, 1891.
(Paraphed) G. H. K., D. P.

Schedule No. 17.

Province of Quebec, District of Montreal, Superior Court of the Province of Quebec

VICTORIA, by the grace of God, Queen of the United Kingdom of Great Britain and Ireland, Defender of the Faith, Empress of India.

No. 18. Copy of Declaration and Writ in *re* de Hertel *vs.* Roe, S. C. Montreal, No. 1460, dated 3 April, 1891. Petitioner's Exhibit No. 7.

To any of the Bailiffs of our said Superior Court, duly appointed for the district of Montreal, Greeting.

We command you to summon Alfred Edward Roe, gentleman, and Dame Elizabeth Mary Tunstall, widow of the late Edward Roe, both of the City and District of Montreal to be and appear before our said Superior Court, in the Court House, in the City and District of Montreal, on the seventeenth day of April instant, to answer the demand of Dame Charlotte De Hertel, wife separate as to property of George E. Fenwick, of Montreal aforesaid, doctor of medecine, and the latter to authorize his said wife, and the said George E. Fenwick, and Dame Charlotte De Hertel, both herein acting in their quality of executors of the last will and testament of the late Amelia Robertson, in her lifetime of Montreal aforesaid, spinster, executed before W. F. Lighthall and colleague, notaries, at Montreal, on the 8th October 1879, and of the Codicil thereto before said notaries on the 5th February 1891 contained in the hereto annexed declaration

And have, there and then or before, this writ and your proceedings thereon.

In witness whereof we have caused the seal of our said Superior Court to be hereunto affixed, at Montreal, this third day of April, in the year of our Lord one thousand eight hundred and ninety-one.

(Signed) JOSEPH DAOUST,
Dep. Prothonotary of the said Superior Court.

(True Copy.)
JOSEPH DAOUST,
Dep. Prothonotary of the said Superior Court.

RECORD.

In the Superior Court.

No. 18. Copy of Declaration and Writ in *re* de Hertel *vs.* Roe, S. C. Montreal, No. 1460, dated 3 April, 1891. Petitioner's Exhibit No. 7. —*continued.*

Province of Quebec, } Superior Court.
District of Montreal. }

No. 1460.

Dame Charlotte de Hertel & al., *es qual.* - - Plaintiffs;

vs.

Alfred Edward Roe & al. - - - - - Defendants.

The said Plaintiff, as described in the Writ of Summons hereto annexed, complain of said Defendants in said Writ also named, and declare:

That heretofore, to wit, at Montreal, in the District of Montreal, on the eighteenth day of June, one thousand eight hundred and seventy-nine, by Deed of Agreement, executed in authentic form before William F. Lighthall, Notary Public, the late Amelia Robertson, spinster, party thereto of the first part, and the Defendants in this cause, parties thereto of the second and third part, declared and agreed as follows, to wit: "That the said late Amelia Robertson and the said Dame Elizabeth Mary Tunstall were in possession of the Seigniory DeLéry in the County of Napierville, in said Province, and of the rights and privileges, lucrative and seignioral, thereto belonging, including the indemnity payable by the Dominion of Canada in respect thereof as being jointly entitled to hold and enjoy the same during their natural life, by virtue of the last Will and Testament of the late William Plenderleath Christie, esquire, the said seignioral property and rights after their death to revert and accrue to their children respectively born in lawful wedlock, in entire property;

That the said Alfred Edward Roe was the only child of the said parties, and the only person who could after the death of the said persons entitled to enjoy during their lifetimes, receive the said Seigniory property in entire ownership;

That for good and valid consideration and particularly for the reasons and considerations in said deed of agreement set forth, it was therein stipulated and agreed by the said parties thereto amongst other things that, in case the said Dame Mary E Tunstall should survive the said late Amelia Robertson, then and in such case the said Defendants Mary E. Tunstall and Alfred Edward Roe, both parties to said agreement, should as they thereby bound and obliged themselves jointly and severally, pay to the legal representatives of the said late Amelia Robertson or whomsoever she should have appointed on her behalf to receive same, the sum of eight hundred and eighteen pounds (£818 0 0) currency of Canada, as follows, to wit: One hundred pounds forthwith at and upon the decease of the said late Amelia Robertson; one-half of the balance or remainder, to wit, three hundred and fifty-nine pounds, on the twentieth day of March or twenty-eighth day of November, which ever should first arrive after the decease of the said late Amelia Robertson, and the remaining three hundred and fifty-nine pounds, the other half of the said balance, on such twentieth day of March or twenty-eighth day of November, which ever would then next arrive after such decease, the whole as is more fully at length set forth in said deed of agreement, an authentic copy whereof is herewith filed as part hereof;

RECORD.

In the Superior Court.

No. 18. Copy of Declaration and Writ in *re* de Hertel *vs.* Roe, S. C. Montreal, No. 1460, dated 3 April, 1891. Petitioner's Exhibit No. 7. —*continued.*

That ever since the making of the said agreement the said Defendants have acquiesced therein and acted upon the same which was and is virtually a transaction upon contingent and legal claims;

That the said late Amelia Robertson departed this life at Montreal aforesaid on or about the eighth day of February last (1891) having previously executed her last Will and Testament in authentic form, at Montreal aforesaid before William F. Lighthall and colleague, Notaries Public, on the eighth day of October, one thousand eight hundred and seventy-nine, whereby after the several special legacies therein set forth, the said testatrix Amelia Robertson, in order to execute the same, named and appointed the said Plaintiffs sole executrix and executor of said Will, extending their powers as such beyond the year and day allowed by law;

That the said Testatrix Amelia Robertson subsequently executed a Codicil to her said last Will and Testament, before William F. Lighthall and colleague, Notaries, on the fifth day of February, one thousand eight hundred and ninety-one, without however, thereby charging the said executorship or affecting the powers of the said Plaintiff thereunder.

That the said last Will and Testament, and Codicil have been duly registered according to law, as appears by the copy thereof, filed as part hereof.

That by reason of the premises and by law the said Defendants herein, on and after the said eighth day of February last past, became, were and still are bound and jointly, and severally liable to pay to the said Plaintiff, who have been in possession of the estate and succession of the said testatrix, as such executrix, the said sum of one hundred pounds which by and executor since the death of said late Amelia Robertson, the said agreement was made payable at and upon the decease of the said late Amelia Robertson, and were and are moreover, since the twentieth day of March last past, also jointly and severally bound and liable to said Plaintiffs in said quality the further sum of three hundred and fifty-nine pounds, currency of Canada, as being the second instalment of said sum of eight hundred and eighteen pounds so made payable by the said agreement inasmuch as the said last named date occured in the month of March next, after the decease of the said late Amelia Robertson.

That the said two sums of money, form, added together, the sum of four hundred and fifty-nine pounds, current money of Canada, equal to one thousand eight hundred and thirty-six dollars, currency of Canada, which said last mentioned sum, the said Defendants although admitting and acquiescing in the several premises have failed and neglected, and still fail and neglect to pay and satisfy said Plaintiff, though thereto duly requested, and although duly put in default to pay the same forthwith upon and after the said dates on which the same became severally payable as aforesaid.

Wherefore, the said Plaintiffs bring suit and pray that the said Defendants be jointly and severally adjudged and condemned to pay and satisfy to Plaintiffs in their said quality, the sum of one thousand eight hundred and thirty-six dollars, together with interest on four hundred dollars, from the eighth day of February last past, and on the one thousand four hundred and thirty-six dollars,

In the Superior Court.

No. 18. Copy of Declaration and Writ in *re* de Hertel *vs.* Roe, S. C. Montreal, No. 1460, dated 3 April, 1891. Petitioner's Exhibit No. 7. —*continued.*

from the twentieth day of March last past, until final payment in each case, and costs of suit and of exhibits distraits to the undersigned attorneys.

Montreal, 3rd April, 1891.

(Signed) LAFLAMME, MADORE, CROSS & LAROCHELLE,
Attorneys for Plaintiffs.

(True Copy.)
LAFLAMME, MADORE, CROSS & LAROCHELLE,
Attorneys for Plaintiffs.

(On the back.)
Writ and Declaration. Copy.

(Endorsed.)
Petitioners' Exhibit No. 7. Fyled 11 mai, 1894.
(Paraphed) J. M., D. P.

Schedule No. 18.

Province of Quebec, } Superior Court.
District of Montreal. }

On the 8th day of June, 1894;

No. 1460. Present: The Hon. Justice ARCHIBALD.

In re

The Cadastre of the Seigniory de Lery,
and
Dame Charlotte de Hertel & al. - - - Opposants;
and
Alfred E. Roe, - - - - - - - Intervenant.

No. 19. Copy of Judgment in the Superior Court, rendered 8 June, 1894.

The Court, having heard the parties, Opposants and Intervenant, on the merits of their respective contentions; examined the procedure, documents of record and proof, and deliberated:

Seeing the Opposants pray that the female Opposant should be adjudged and declared to be the owner for one-sixth of the said Seigniory DeLéry; that all seignioral rights and dues to the extent of said share, including *cens et rentes, lods et ventes, droits de banalité,* and other rights and privileges or any indemnity in lieu thereof to be redeemed or paid by the Government of Canada or any public officer or any person be paid to her as such owner and as being entitled to the same;

Seeing said Opposant alleges in support of her said claim, that by the Will of the late William Plenderleath Christie, executed on the 17th day of March, 1842, in English form, the said Wm. Plenderleath Christie, then being the proprietor of the said Seigneurie DeLéry, disposed of the same, as follows:

"I give, devise and bequeath, to the said Henrietta Katherine Robertson of Montreal, widow, during her natural life and, after her decease 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 and entire property share and share alike, all and every the tract and parcel of land

RECORD.

In the Superior Court.

No. 19. Copy of Judgment in the Superior Court, rendered 8 June, 1894. —*continued.*

called and known as the Seigniory DeLéry, situated and being in the said Province of Canada, ... 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 property."

That the said Wm. Plenderleath Christie died, and the said property was after his death, received and enjoyed under the Will by the said Katherine Robertson until her death, and after her death, it was received and enjoyed by the said Mary and Amelia and Elizabeth until the death of Mary without children;

That upon the death of Mary, her one-third share went by necessary intentment to Amelia and Elizabeth, to be by them subsequently handed over as directed by the Will, and that in fact the property of Mary's was held and enjoyed by Amelia and Elizabeth in equal shares until the death of Amelia, who also died without children;

That so far as regards the share of Mary, the second and final degree of the substitution was reached by the transference of the property from Mary to Amelia and Elizabeth, and that Amelia became indefeasible proprietor of half of Mary's share, viz: one-sixth of the whole Seigniory;

That Opposant is the universal representative of Amelia under her Will before Lighthall, N. P., on 9th October, 1879, and so entitled to the said one-sixth of the said Seigniory in full property;

Seeing the Intervening party alleges that by the terms of the said clause of said Will above recited, the rights of the said Katherine Robertson and Elizabeth Tunstall were not those of *grevés de substitution* but only of usufructuarys; that he was the only issue of Elizabeth Tunstall and survived his mother, and became under the terms of the Will sole proprietor of said Seigniory, the said Mary and Amelia Robertson having died without children;

Seeing the said Intervening party has died since the filing of the said intervention, and Dame Emily Charlotte Goddard, his widow, in her quality as executrix of his last Will, has taken up the instance in his lieu and stead;

Seeing Intervening party *par reprise* also urges in support of said intervention that at the time when the Will of the late William Plenderleath Christie was made, as well as at the date of the death of the testator, substitutions were not by law limited to two degrees, but might be created in perpetuity and that Intervening party could take under the terms of the Will, even admitting that he was beyond the second degree;

Considering that the clause of the said Will above cited created a substitution of which Catherine Robertson was institute and Mary Robertson, Amelia Robertson, and Mary Elizabeth Tunstall were substitutes in the first degree;

Considering that at the death of Mary Robertson without children, her share went by necessary intendment of the Will in equal shares to Amelia Robertson and Mary Elizabeth Tunstall;

Considering that as held in *Jones* vs. *Cuthbert*, this transmission of Mary's share constituted the second and final degree in the substitution, and that Amelia Robertson so became indefeasible proprietor of one-half of Mary's share, viz: one-sixth of the whole Seigniory;

No. 19. Copy of Judgment in the Superior Court, rendered 8 June, 1894. —*continued.*

Considering that the statutes of 1784 and 1801 relating to freedom of disposing of property by will did not abolish or affect the common law prohibiting perpetuities;

Considering in consequence that the Opposant is entitled to the conclusions of her opposition and to be declared the proprietor of one-sixth of said Seigniory DeLery or rights representing the same;

Doth maintain Opposant's opposition according to the conclusions thereof above recited, and doth dismiss the intervention of the intervening party with costs.

(A true copy.) S. PEPIN, Deputy P. S. C.

(Endorsed.)

Copy of Judgment for the Review.

Schedule No. 19.

No. 20. Inscription in Review, dated 16 June, 1894.

Province of Quebec, District of Montreal. } Superior Court. (In Review.)

In the matter of

The Cadastre of the Seigneurie de Léry,

and

Dame Charlotte de Hertel & al., - - - - Opposants.

and

Alfred E. Roe, - - - - - - - - - Intervenant.

I inscribe this cause for hearing in Review of the final judgment rendered in this cause by the Superior Court, sitting in and for the District of Montreal, on the 8th day of June instant.

Montreal, 16th June, 1894.

E. LAFLEUR,
Attorney for Intervenant.

To Messrs. Cross & Bernard,
Attorneys for Opposants.

Gentlemen,

Take notice of the foregoing inscription and that Intervenant has this day deposited the amount required by law with the Prothonotary of the Superior Court, for such hearing in Review.

Montreal, 16th June, 1894.

E. LAFLEUR,
Attorney for Intervenant.

Received Copy.
CROSS & BERNARD,
Attorneys for Opposants.

(Endorsed.)

Inscription in Review and Notice. Fyled 16 June 1894, with deposit forty dollars.

(Paraphed) G. H. K., Dep. P. S. C.

RECORD.

In the Court of Queen's Bench.

No. 21. Appellant's Case, dated 16 November, 1895.

DOCUMENT IV.

APPELLANTS' FACTUM.

The Appellant and George E. Fenwick (since deceased), in their quality of executors of the will of the late Amelia Robertson, were the Opposants in the opposition which was dismissed by the judgment now appealed from.

By their opposition they alleged that the late Amelia Robertson, at the time of her decease was full owner of one undivided sixth of the Seigniory de Lery, and the rights and indemnity arising therefrom.

The title of Amelia Robertson, set forth in the opposition, was as follows:

The Seigniory was bequeathed by the late William Plenderleath Christie, in his will, to Catherine Robertson during her natural life, and after her death to her daughters Mary and Amelia Robertson, and her niece Mary Elizabeth Tunstall, with a provision that if two of the three—Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall—should die without issue the bequest should go to the children of the survivor.

That Catherine Robertson, at her death, transmitted the bequest to the three above-named persons who took it in their turn. That Mary Robertson next died, and at her death transmitted her share, one-half, to Mary Elizabeth Tunstall, and the other half—namely the sixth now claimed—to Amelia Robertson. But this sixth share having been enjoyed by three persons could not be further substituted, and therefore vested finally in Amelia Robertson and passed under her will to the opposants.

The Respondents are successors in title to Alfred E. Roe, the heir and issue of Mary Elizabeth Tunstall.

Alfred E. Roe intervened and contested the opposition, in substance alleging that Mary Robertson had merely had a share of usufruct which, by her death, went by accretion, to her two co-legatees, denying that the ownership of the share in question had vested in Amelia Robertson, and alleging that it had devolved to him, because the late William Plenderleath Christie had provided in his will that if two of the said three persons should die without children the bequest should go to the children of the survivor, that Mary and Amelia Robertson did both die without children and that he was the only child of the survivor Mary Elizabeth Tunstall.

Issue being joined and the facts established by admission, the opposition was maintained by the judgment of first instance, reported in *Rapp. Jud. Off.* 6 Superior Court, page 101. But this judgment was reversed in Review by the decision of a majority of judges, which is now under appeal.

The case turns upon the interpretation to be put upon the part of the late William Plenderleath Christie's Will, which is worded as follows:—

"I give, devise, and bequeath to the said Catherine Robertson, of Mont-
"real, widow, during her natural life, and after her death to her daughters
"Mary and Amelia Robertson, and to her niece Mary Elizabeth Tunstall, con-
"jointly 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 Seigniory de Lery, situated and being "in the said Province, etc.....,

"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 Marv 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.)

It is characteristic of dispositions creating substitutions, that the intention to substitute may be quite clear without each alternative benefit conferred being formally expressed in the instrument.

Hence the freedom with which the writers upon the Ordinance of 1560 affirm that substitutions have often to be filled out by interpretation or the declaration of tacit substitutions.

"Peu importe que les termes soient impropres s'il résulte suffisament de la "disposition qu'on a voulu substituer fidéi-commissairement."

"Quoiqu'il en soit il est certain qu'avant l'ordonnance des substitutions, "nous admettions des fidéi-commis sur de simples conjectures."

Thevenot d'Essaulles, Substitutions (Can. Ed.) Nos. 183 and 255.

"La gradualité peut s'établir expressement ou tacitement. Elle est tacite "toutes les fois qu'il paraît évidemment par la disposition que tel a été le voeu "du substituant quoiqu'il ne l'ait pas formellement déclaré."

Merlin, Rep. vo. "Substitutions fidéi-commissaire," p. 152.

It is to be noted that in the first sentence the bequest is given over not to heirs generally but to "children born in lawful wedlock," and then another sentence is added which in reality imports a declaration of the testator's intention, that the entire bequest shall devolve to the children of those who leave children, even if only one of them have children. If two of the three had died leaving children, it is just as clear that the testator intended the whole bequest to go to those children of two families, as if he had said so in so many words. So too it appears to the undersigned just as clear that the testator intended the bequest to be transmitted to the survivors of the three upon the death of the first of them without issue as if he had expressly so declared, and indeed that he did in effect so provide when he fixed the death of the one who should leave children (if that one should happen to die last) as the time at which the transmission to the children was to take effect.

The common example of a tacit substitution given in the books is a case of a bequest to two persons with charge to a survivor to deliver over to a third, and it is commonly stated that there is no tacit substitution if the two and not the survivor only are to deliver over, but it is still often left as matter of interpretation to be determined in what cases it is that it is the survivor only who is to deliver over.

In the example given in the books, the third person or substitute is always supposed to be in existence and ready to take. This element is, however,

RECORD.

In the Court of Queen's Bench.

No. 21. Appellant's Case, dated 16 November, 1895. —*continued.*

wanting in the present case because the will declares that those who are to take (the substitutes) must be children and the children of the survivor, and it is manifest that at the death of the first of the three legatees there were no children in whose favor a right could then have opened but that the legacy was next to pass into the hands of other persons whose death in turn had to take place before it finally went on to the children. Were it not that the bequest was thus limited to children the case might have come within the significant exception made by *Pothier* to the specimen case just referred to where he finds no tacit substitution to exist, since both of two legatees are charged to deliver over and which exception he enunciates as follows: "sauf qu'en cette "dernière espèce le testateur a voulu que la substitution dont il a grevé le pre- "mier décédé fut différé au temps de la mort du dernier décédé, 'puta' afin "qu'ils pussent en attendant se succéder l'un à l'autre s'ils étaient héritiers l'un "de l'autre." *Pothier*, Coutume d'Orléans—Des Testaments et Donations Testamentaires, Introduction au Tit. 16, Art. 5, Regle. 10.

In support of the Respondents' contestation there have been advanced in substance three propositions, namely:

First: When the will in question took effect the power to substitute was unlimited and not restricted to three degrees, so that if a substitution existed, it did not end with Amelia Robertson.

Secondly: No transmission took place at the death of Mary Robertson, the bequest being merely subjected to a condition and the transmission being suspended until the fulfilment of the condition.

Third: The disposition separated the usufruct from the naked ownership so as to prevent any transmission of ownership by the death of Mary Robertson.

The first of these contentions need not be considered at length. It has not been sanctioned by the judgment under appeal and the reasons given by the trial judge in pronouncing the first judgment, coupled with the remarks of the late Chief Justice Lafontaine in *Blanchet* vs. *Blanchet*, put it beyond question that the statutes which introduced what is called "unrestricted liberty of disposing by will," by no means had the effect of enacting that testators could control the devolution of property for an indefinite number of generations.

As regards the second ground of contestation relied upon by Respondents though not set up in their intervention, namely, that no transmission took place upon the death of Mary Robertson in consequence of a suspensive condition, it appears to the undersigned, that a confusion of ideas existed in the mind of the learned Judge who in particular took this view of the case.

The reasoning in support of this view rests upon article 963 of the Civil Code, which makes provision for the case where a substitution in consequence of a condition inserted in the disposition, is made to open at a time other than at the death of the institute.

It cannot be supposed that a testator by merely writing a condition into his will can so escape the effect of the limitation of degrees, as to enable him to gratify three or more legatees with the same bequest by pretending that no transmission is being operated.

It is clearly a violation of the intention of the testator in the present case to say that in virtue of this Article 963 of the Civil Code, the heirs at law of

Mary Robertson continued a suspended right of enjoyment which she had exercised because the will itself specially provided that the legacy should go to the children of the three legatees.

The effect of the condition when fulfilled is, according to the authorities, to purify the trust, "c'est-à-dire, rendre semblable au fidé-commis pur,"—*Thevenot d'Essaules*, No. 498. This does not, however, mean that the successive degrees of enjoyment which, in the meantime, have been exercised are to count for nothing when the application of the Ordinance limiting degrees to three is in question.

If effect were given to the views sanctioned by the judgment appealed from, the limitation of degrees of substitution to three would be nugatory, as has been clearly pointed out by the dissenting judge in a previous decision of *Page* vs. *McLennan*, Rapp. Off. vol. 7, page 378, where he stated that "if this "Article (referring to the 124th Article of the Ordinance of 1747) were construed "to accord with the pretensions of the Plaintiffs, a testator might have given "concurrent enjoyment of his estate to his son, grandson and great-grandson "with successive rights of survivorship to be followed by reversionary rights "of an almost unlimited kind as to the portion of the last survivor."

Attempts to evade the operation of the Ordinance limiting the number of degrees to three were uniformly repressed under the old law.

The third ground of the holding in favor of Respondents is in substance that there was separation of the usufruct from the naked ownership instead of substitution of the property.

Both this view and the second one above considered are at variance with the rule that property cannot be in suspense but must have an owner.

According to the second view, the share of Mary Robertson must have been passed to the Respondent through the heirs at law of Mary Robertson and it seems to the undersigned that this is admitting that there was a transmission beyond the legal limit. The third view presently under consideration however attempts to avoid this difficulty by the supposition of a separation of usufruct and an accretion between the three legatees.

There are frequent cases reported in which the Courts have held, that although a testator has made use of the word "usufruct," the nature of the disposition is such as to make it in reality a case of substitution, C. C. Art. 928; *Dalloz*, Jur. Gen. Substitution, No. 183; but no cases are to be found where it has been held, that when a testator, as in the present case, disposed of the thing itself and not of the mere usufruct, he has nevertheless been held to have disposed only of the usufruct. The test in all such cases is involved in answering the question; if only a usufruct was created, who was the owner of the *nue propriété?*

It is respectfully submitted that the authorities leave no room for doubt upon this question. Cases where there has been a formal and express separation of usufruct from naked ownership have been held to be attempts to evade the rule limiting degrees of substitution. *Ricard* "Substitutions," Traite III, Ch. 9, Sec. 6, partie 1, page 437. *A fortiori* should the rule be applied when there has been no express language in the disposition separating usufruct from ownership, as in the present one. There is nothing whatever in the will in

RECORD.

In the Court of Queen's Bench.

No. 21. Appellant's Case, dated 16 November, 1895. —*continued.*

question upon which to base the argument, that the testator intended the bequest to be dealt with in the way suggested, and as has been stated, even if he had so ordained in express language the disposition would have been in conflict with the Ordinance.

" XXVI.—On ne peut même augmenter les dégrès en séparant la propriété " d'avec l'usufruit, et donnant l'un et l'autre à differentes personnes successive- " ment telle disposition n'empêche pas la reduction ci-dessus, mais il faut ex- " cepter les duchés-pairies, par rapport auxquelles les substitutions perpétuelles " sont encore autorisées, c'est exception favorable et politique."

Bourjon, Substitution, Titre 5, Sec. 4, Art. 24.

After the abolition of fiduciary substitutions in France numerous contestations naturally arose in connection with attempts to maintain dispositions on the ground of their being merely bequests subjected to suspensive conditions and not substitutions properly speaking. The consequent jurisprudence has had the effect of making it tolerably clear, when it is a case of substitution on the one hand, and when it is merely a conditional disposition on the other, and the following citation expresses the distinction with clearness:

" Ce qui distingue de la substitution les dispositions simplement condition- " nelles, c'est que dans la substitution il y a deux transmissions successives, dans " les dispositions conditionnelles par suite de l'effet rétroactif de la condition, il " y a *une seule transmission* qui s'opère directement et immediatement du testa- " teur, soit a l'héritier, en cas de condition resolutoire, soit au legataire en cas " de condition suspensive lequel héritier ou légataire reste en definitive proprie- " taire de la chose leguée.

" Mais il ne faut pas que la condition de la transmission au second institué " présuppose nécessairement le décês du premier qui aura recueilli; autrement " il y aura substitution prohibée."—*Dalloz*, Jur. Gen. Substitution, No. 123.

Tried by this test it becomes manifest that the present is not the case of a condition within the meaning of Article 963 C. C. at all.

Numerous decisions might be cited confirmatory of this opinion:

" La clause par laquelle un père en leguant la quotité disponible à deux de " ses enfants, dispose que s'ils viennent à se marier et que l'un d'eux seulement " ait des enfants, ceux-ci recueilleront dans la succession de leur oncle décèdé " sans posterité, la portion de biens qu'il aura obtenu dans la quotité léguée, " renferme une véritable substitution fidei-commissaire prohibée par la loi."—*Sirey*, 38, 2, 446. *Ib.* 37, 1, 251.

It is to be noted that the last clause of the disposition makes use of the significant words " shall go and belong to," words which in this connection are the precise equivalent of the French verb " retourner," one of the most decisive expressions which can be made use of to indicate the existence of fiduciary substitution, embodying as it does in itself the decisive elements of successive benefits and lapse of time *ordre successiff et tractus temporis*.

It is idle to reproach the Appellant with attempting to defeat the intention of the testator, because the logical position of the Appellant is in the first instance to show what beyond doubt was the intention of the testator, and in the second place to show that at a certain stage a law of public policy steps in and prevents such intention of the testator from being further carried into effect.

No. 21. Appellant's Case, dated 16 November, 1895. —*continued.*

But since it is so strongly insisted on the part of the Respondents that the testator's intention must be the absolute and ultimate guide, it is surely fair to ask if it can be supposed that this testator even for a moment imagined that in making the disposition in question he was making any such series of fanciful dispositions as are now by interpretation sought to be read into his will in order to support the Respondents' claim.

The undersigned respectfully submit that the Judgment in Review appealed from should be reversed and the judgment of the first instance restored with costs of all there jurisdictions.

Montreal, 16th November, 1895.

CROSS & BERNARD,
Attorneys for Appellant.

(Endorsed.)
Appellants' Case. Fyled 15th Jan'y, 1896.
M. & D.

DOCUMENT V.

No. 22. Respondent's Case, dated 1 November, 1895.

Canada,
Province of Quebec,
District of Montreal.
No. 267.

In the Court of Queen's Bench.
(Appeal Side.)

In the matter of
The Cadastre of the Seigniory De Lery,
and
Dame Charlotte de Hertel & al., (Opposants in Superior Court) - - - - - - - - - Appellants;
and
Dame Emily Goddard, *es qual.*, (Intervenant continuing suit in Superior Court) - - - - - Respondent.

RESPONDENT'S FACTUM.

The present appeal is taken from a Judgment rendered by the Court of Review on the 19th June 1895, reversing a Judgment rendered by the Superior Court on the 8th June 1894, which maintained the opposition made in this case.

The Appellants' proceedings were taken under Article 5510 of the Revised Statutes of Quebec, by an opposition claiming that the Appellants were the owners of one-sixth of the Seigniory de Lery, and asking that all seignioral rights and dues to the extent of their said share, which were to be redeemed or paid by the Receiver-General of Canada, should be paid to the Appellants to the extent above indicated.

This application was contested by the late Alfred Edward Roe by an intervention claiming that he was the sole owner of the Seigniory de Lery, and consequently, entitled to all the seigniorial rights and dues payable by the Government of Canada.

The case turns upon the interpretation to be given to a clause of the Will of the late William Plenderleath Christie, which reads as follows:—

RECORD.

In the Court of Queen's Bench.

No. 22. Respondents' Case, dated 1 November, 1895. —*continued.*

"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 neice 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 Seigniory de Léry, situate and being in the said "Province, etc., etc., etc.....

"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 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 property and enjoyed it until her death, whereupon Mary and Amelia Robertson and Mary Elizabeth Tunstall entered into possession of the property conjointly until the death of Mary Robertson, 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 Mr. Roe and had issue, Alfred E. Roe, the original intervenant in this cause, now represented by his widow and executrix who has been allowed to continue the suit.

The Appellants' contention is that the second paragraph of the Will above quoted created as between Mary and Amelia Robertson and Mary Elizabeth Tunstall a gradual substitution under which the share of any one of them dying without children would pass to the other two, and upon the death of a second of them, also without children, the whole would vest in a third, to be by her handed over to her children, if any she had, or in default of such children, to the different charities named.

This interpretation was adopted by the judgment of the Superior Court, which consequently held that upon the death of the testator, Catherine Robertson became institute, and upon her death, Mary and Amelia Robertson and 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, in so 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, the three degrees having been exhausted, and consequently, that Amelia Robertson thus became full proprietor of one-half of the share of Mary Robertson, which half the female Opposant was entitled to as universal legatee under the Will of Amelia Robertson.

I.

The Respondent contends, in the first place, that upon a true interpretation of the above cited clause of the Will of the late W. P. Christie there was at the death of Mary Robertson no transmission of her share to Amelia Robertson and Mary Elizabeth Tunstall, the will providing for no further substitution in the case of only one of the three substitutes in the first degree dying childless, the substitution being created only in the event of two of them so dying. Consequently upon the death of Mary Robertson it was still uncertain whether the condition upon which any further substitution of her share depended—namely the death of another of her co-legatees without children—would ever be fulfilled. It is submitted that under these circumstances Mary's share vested in her lawful heirs and remained vested in them pending the fulfillment of this condition, which while it operated as a suspensive condition in so far as regards any further substitution of her share, constituted as regards the right so vested in her heirs, a resolutive condition or one upon whose fulfillment their right would be dissolved and the transmission would then take place.

The Respondent contends that under these circumstances the share of Mary Robertson did not pass under the substitution until the death of Amelia Robertson without children, which event fulfilled the condition, so that Amelia Robertson never had any right whatever in Mary's share and could not bequeath any part thereof to the Opposant.

It will be observed that the supposed transmission of Mary Robertson's share upon her death to her co-legatees is not provided for by the will. This was expressly admitted by Mr. Justice Archibald, who delivered the judgment of the Superior Court; but he holds that some proprietor must be found for this one-third share upon the death of Mary Robertson and consequently, that the Court must complete the will by intendment and read into the will a gradual substitution.

The Respondent submits that it is by no means necessary to read into this will a clause which would have the effect of frustrating the intention of the testator. The testator was perfectly free to create a substitution which would take effect only upon the fulfillment of some condition other than the death of the institute and which might be fulfilled only after her death. Now Article 963 of the Civil Code appears to provide exactly for such a case by enacting that where by reason of a pending condition or some other disposition of the will, the opening of the substitution does not immediately take place upon the death of the institute, his heirs and legatees continue, until the opening, to exercise his rights and remain liable for his obligations. Accordingly, if, at the death of Mary Robertson, any further substitution of her share depended upon a condition not yet fulfilled, the court is not bound to supply an institute to hold the property, pending the fulfillment of the condition, but, under Article 963 C. C., the heirs of Mary Robertson would continue her person as it were and be liable to fulfil her obligation of handing over the property substituted when the happening of the condition opened the substitution.

The Judgment of the Court of Review is based on the argument above developed, although Mr. Justice Loranger would also, as appears from his notes, have maintained the pretension of the Respondent discussed in the next paragrahp.

RECORD.

In the Court of Queen's Bench.

No. 22. Respondents' Case, dated 1 November, 1895. —*continued.*

II.

The Respondent also contends that under the law in force when the will was made (1842) and when it took effect by the death of the testator (1845) there was no limitation as to the number of degrees to which the testator might substitute property bequeathed by him. This case must be decided by the law in force before the enactment of the Civil Code, and, under the Act of 1801 (41 George III, ch. 4, sec. 1) relating to the freedom of willing, it is submitted that all prohibitions previously existing in regard to the number of degrees in substitutions be done away with.

This Act provides as follows:—And it is hereby enacted by the authority "of the same that it shall and may be lawful of 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 hus- "band or wife in favor of one or more of their children, as they may see meet, "or in favor of any 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 acquêts* or *conquêts*, without reserve, restriction or limitation whatsoever "any law, usage or custom to the contrary hereof, in any wise notwithstanding; "provided always, that it shall not be lawful for a husband and 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 favor of any corporation or any person in *main-morte*, "unless the said person or corporation be by law entitled to accept thereof."

The interpetation given to this statute by the Respondent in that which was put upon it by the codification commissioners, as appears by their fifth report under article 186, which they drafted as expressing in their opinion the then existing law on the subject.

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

And on page 191 the commissioners make the following observation on this subject:

"Article 186 solves in the affirmative, as has already been stated, the ques- "tion of the 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 com- "missioners 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 abolished."

Article 186, drafted by the Commissioners, was not adopted by the Legislature, and our present Article 932 was passed in place of it, limiting substitutions to two degrees exclusive of the institute. It will be noted that Article 932 C. C. is inclosed in brackets, which indicates that it is new law.

The opinion of the Codifiers on this subject was discussed in the case of *Jones* vs. *Cuthbert*, M. L. R. 2 Q. B. 44, where Mr. Justice Ramsay thought there might be good reason for concluding that the Act of 1774 (14 George III, ch. 83) abolished the limitation previously existing as to degrees of substitution, although the Privy Council had construed the Act otherwise, but left it an open question as to whether the limitation of substitutions to three degrees was the law of this Province after the passing of the Act of 1801, until the coming in force of the Civil Code. In *Blanchet* vs. *Blanchet*, 11 L. C. R. 204, Sir L. H. Lafontaine expressed the opinion that the law of 1801 had not abolished the restriction as to the degrees of substitution, but this was also a mere *obiter dictum* as the question did not call for solution in the case under consideration.

Mr. Justice Archibald cites English authorities to show that the codification commissioners must have been mistaken in their behalf that the English rule, which they thought it was the intention of the statute of 1801 to adopt, allowed substitutions to take place beyond three degrees. He cites from "Jarman on Wills," fourth edition, vol 1, page 250, to establish the proposition that in England the true limit of the law against perpetuities was a life or lives in being and twenty-one years, and concludes that the policy of the English law was quite as much against perpetual substitutions as the French law.

Without presuming to express an opinion with any degree of confidence upon the law of England as it existed in 1845, the Respondent respectfully submits that the English authorities referred to by Mr. Justice Archibald do not establish the proposition that a testator cannot by will create a future estate for more than lives in being and twenty-one years in the sense that the entail beyond this limit would be void, but that all that the English rule means is that a testator cannot create a future estate for a longer period than the one stated, which must necessarily come into operation; that is to say, the testator cannot tie up his property for more than a certain number of generations with the certainty that his wishes and not those of his heirs will govern; for it is always possible for the heirs to bar the entail.

However this may be, it is submitted that the true interpretation of the statute of 1801 justifies the opinion expressed by the codifiers that in this Province the restriction of substitutions to three degrees was done away with until the coming in force of the Civil Code which re-introduced the old law of France on the subject.

III.

Lastly, the Respondent contends that even if such limitation to three degrees existed, the law governing the manner in which such degrees should be counted was contained in article 124 of the Ordinance of 1629, and that under that article Mary and Amelia Robertson and Mary Elizabeth Tunstall, having taken the property conjointly and concurrently, should be counted but as one degree in the substitution. Article 124 of the Ordinance reads as follows:

"Voulons que dorénavant les dégrés des dites substitutions et fidéi-commis "par tout notre Royaume, soient comptés par têtes, et non par souches et généra- "tions: c'est-à-dire chacun de ceux qui auront appréhendé et recueilli le dit "fidéi commis, fasset un degré *sinon que plusieurs d'eux eussent succédé en concur-*

RECORD.

In the Court of Queen's Bench.

No. 22. Respondents' Case, dated 1 November, 1895. —*continued.*

" *rence* comme une seule tête, auquel cas ne seront comptés que pour un seul " degré. Déclarons nuls tous les arrêts qui seront ci-après donnés au contraire " de ces présentes, nonobstant tout usage ancien ou autrement, et sans préjudice " des arrêts ci-devant intervenus."

The Respondent contends that if this Ordinance was in force in 1845 the article above cited would clearly apply to this case and prevent the application of the rule regarding the limitation of substitutions from taking effect.

It is urged, however, on behalf of the Appellants that the Ordinance of 1629 was never in force in this Province and the recent opinions expressed by this Court in the case of *Stewart & Molsons Bank* (R. J. Q. 4 Q. B. 11) and *Massue & Resther* (R. J. Q. 4 Q. B. 57), will doubtless be cited as conclusive. While the Respondent would not wish to further insist upon this point in an argument before this Court, if the question had been conclusively decided against her pretensions, she respectfully submits that the opinion of this Court expressed in the last mentioned cases was *obiter dictum* inasmuch as the cases were really decided upon other grounds, and feeling, as she does, that the question is still technically open for discussion in this Court, she respectfully submits the undermentioned authorities in support of the proposition that the Ordinance of 1629 was in force in this Province before the enactment of the Civil Code.

Vaughan vs. *Campbell*, 5 L. C. R. 431.
Blanchet vs. *Blanchet*, 11 L. C. R. 220.
King vs. *Demers*, 15 L. C. J. 129.
Joubert vs. *Walsh*, 12 R. L. 334.
Cuthbert vs. *Jones*, M. L. R. 2 S. C. 23.
(Contrary opinion in Q. B. by Ramsay, J., but formal judgment unchanged.)
Jetté vs. *Crevier*, M. L. R. 6 S. C. 60.
Massue vs. *Massue*, R. J. Q. 3 S. C.
(Confirmed in Q. B., but *considérants* modified R. J. Q. 4 Q. B. 57.)
Mongenais Lamarche, R. J. Q. 4 S. C. 292.
Page vs. *McLennan*, R. J. Q. 7 S. C. 368.
Guyot, Répertoire, vo. " Code " vol. 3, p. 621.
Neron, Recueil d'Edits, vol. 1, p. 782.
Isambert, Edits and Ordonnances.
Bornier, Conférence sur les les Ordonnances de Louis XIV, vol. 1, p. 3 note on article 1; p. 4, note on article 2; p. 6, note on article 5; p. 7. note on article 6; and p. 10, note on article 8.
Salle, Esprit des Ordonnances de Louis XIV., vol. 1, p. 5.
Furgole, On art. 30 of the Ordinance of 1747.
Serres, Instit. du droit Français, Bk. II, tit. 23, par 11, p. 296.
Rodier, sur l'ordonnance de 1667, p. 2.
Ricard vol. 2, p. 247, No. 116.
Bourjon, vol. 2, p. 158.
Ferrière, Dict. de Droit, vo. " Déconfiture."
Merlin, Répertoire, vo. " Code."
Nouveau Denizart, vo " Code." No. 3.

Code Matrimonial, pp. 112-121.
Pothier, Louage, No. 186.
Guénois, Grande Conférence des Ordonnances et Edits Royaux vol. 1, pp. 714, 715, 716, 719, 720, 722, 734, 738, 741, 765, 769, etc., etc.
Dalloz, Répertoire, vo. "Droit Civil," Nos. 417-418.
Jersey v. *Laporte*, 28 May, 1819 (Court of Appeals).
Chillet v. *Nicolas*, 7 Jan. 1806 (Court of Cassation).
Holker v. *Parker*. 19 Ap. 1819 (Cassation).
Hiolsin Trom v. *Canier*, 8 prair. An. xiii. (Appeal).
Spohrer v. *Sorensen*, 18 pluv. An. xii. (Cassation).
Ovel v. *Challier*, 17 Mch. 1830 (Appeal).
Guiot v. *Razetti*, 14 Aug. 1839 (Court of Nimes).
Champeaux-Grammont v. *Cardon*, 13 Aug. 1816 (Cassation).
Merelli v. *Guecco*, 27 Aug. 1812 (Cassation).
Goupy v. *Pisani*, 14 Feb. 1810 (Cassation).
La Ville v. *Wolff*, 13 Jan. 1815 (Cassation).
Aymard v. *Colomez*, 8 Mch. 1822 (Appeal).
Foignet v. *Duchesse de Montfort*, 28 Jan. 1822 (Appeal).
Travy v. *Salsas*, 12 July, 1826 (Montpellier).
Renouil v. *Hery*, Appeal 6 Aug. 1847 (D. 1848, 2, 66).
Prince de Capoue v. *Lenormand*, Cassation, 31 Dec. 1844 (D. 1845, 1, 77).
Maleville, Analyse de la discussion du Code Civil, vol. 4, p. 231.

On the whole the Respondent respectfully submits that the Judgment of the Court of Review should be confirmed with costs.

Montreal, November 1st, 1895.

LAFLEUR & MACDOUGALL,
Attorneys for Respondent.

(Endorsed.)

Respondent's Case. Fyled 14th Nov., 1895.
(Paraphed) M. & D.

RECORD.

In the Court of Queen's Bench.

No. 23. Proceedings in the Court of Queen's Bench from 28 June, 1895, to 25 February, 1896.

DOCUMENT VI.

Transcript and Entries made in the Court of Queen's Bench for Lower Canada.

28th June, 1895.

Messrs. Cross & Bernard fyled an Inscription in Appeal.

12th August, 1895.

The Record is transmitted to this Court.

30th August, 1895.

MM. Cross & Bernard appeared for the Appellant.

31st August, 1895.

MM. Lafleur & Macdougall appeared for the Respondent.

9th September, 1895.

The Case is inscribed on the printed roll.

14th November, 1895.

The Respondents' Case is fyled.

15th January, 1896.

The Appellants' Case is fyled.

18th January, 1896.

Present:

The Honorable Sir ALEXANDRE LACOSTE, Knight Chief Justice.
" " BOSSÉ.
" " BLANCHET.
" " HALL.
" " WURTELE.

The hearing on the merits is commenced.

20th January, 1896.

Present:

The Honorable Sir ALEXANDRE LACOSTE, Kinght Chief Justice.
" " Mr. Justice BOSSÉ.
" " " " BLANCHET.
" " " " HALL.
" " " " WURTELE.

The hearing on the merits is concluded.

Curia advisare vult.

RECORD.

Court of Queen's Bench.

No. 23A. Judgment of the Court of Queen's Bench rendered 25 February, 1896.

DOCUMENT VII.

Canada.
Province of Quebec,
District of Montreal.

Court of Queen's Bench.
(Appeal Side.)

Montreal, Tuesday, 25th February, 1896.

Present:

The Honorable Sir ALEXANDRE LACOSTE, Knight Chief Justice.
" " Mr. Justice BOSSÉ.
" " " " BLANCHET.
No. 267. " " " " HALL.
" " " " WURTELE.

Dame Charlotte de Hertel, of the City of Montreal, widow of the late George E. Fenwick, in her quality of sole surviving Executrix, of the last Will of the late Amelia Robertson, spinster, executed at Montreal, before Lighthall and colleague, notaries, on the 8th October, 1879, and the Codicil thereto, before said notaries, on the 5th February, 1891, (Opposant in the Court below) - Appellant;

and

Dame Emily Charlotte Goddard, of the City of Montreal, widow of the late Alfred Edward Roe, as well in her capacity of Executrix, under the last Will of the said Alfred E. Roe, and Codicil thereto whereof probate was granted by the Prothonotary of the Superior Court at Montreal, on the 16th August, 1893, as in her capacity of Tutrix to her minor daughter, Florence Roe, issue of her marriage with her said husband, appointed as such by act of tutorship homologated at Montreal, on the 13th September, 1893; and Robert Craig, of the same place, doctor in medicine, in his capacity of Curator, duly appointed by *acte de curatelle*, homologated at Montreal on 13th September, 1893, to the substitution created by the last Will and Testament of the said late Alfred E. Roe, (Intervenants *par reprise d'instance* in the Court below), Respondents.

The Court of Our Lady the Queen, now here, having heard the Appellant and Respondents by their counsel respectively, examined as well the record and proceedings had in the Court below, and mature deliberation on the whole being had:

Considering that there is no error in the judgment appealed from, to wit: the judgment rendered by the Superior Court for Lower Canada, sitting in Review at Montreal, in the district of Montreal, on the 19th day of June, one thousand eight hundred and ninety-five, doth affirm the same with costs to the Respondents against the Appellant.

The Hon. Mr. Justice Bossé being absent at rendering of the judgment, his assent was read.

And the Court on motion of MM. Lafleur & Macdougall, Attorneys for Intervenant, doth grant them distraction of costs.

RECORD.

In the Court of Queen's Bench.

DOCUMENT VIII.

16th March, 1896.

Present :

The Honorable Mr. Justice BABY.
" " " BOSSÉ.
" " " BLANCHET.
" " " HALL
" " " WURTELE.

No. 24. Proceedings for leave to Appeal to Her Majesty's Privy Council.

Pursuant to notice given it is moved on the part of the Appellant that she be permitted to appeal Her Majesty's Privy Council from the judgment rendered in this case by the Court of Queen's Bench (Appeal Side) on the twenty-fifth day of February, 1896.

No. 24A. Order allowing Appeal, dated 16th March 1896

The Court doth grant said motion, and the said Dame Charlotte de Hertel *es qual.* is hereby permitted to appeal to Her Majesty in her Privy Council from the said judgment, by her giving within six weeks from this day the security required by law, and in defanlt of such security being given within said delay, the record shall be remitted forthwith to the Court below without any further order.

DOCUMENT IX.

No. 24B. Notice for security, dated 23rd April 1896.

23rd April, 1896.

Present in Chambers :

The Honorable Mr. Justice HALL.

Pursuant to notice given, the Appellant offers as security for his appeal to Her Majesty in her Privy Council, George H. Massy, of Westmount, district of Montreal, civil engineer, and William D. Reid, of the city and district of Montreal, contractor, who having justified as to their solvency, do execute a Bail Bond, which is here taken, acknowledged and fyled.

15th July, 1896.

The Fiat for Transcript is fyled.

The Consent of parties as to the printing of the Transcript is fyled.

In the Court of Queen's Bench.

No. 25. Bail Bond, dated 24th April 1896.

DOCUMENT X.

Canada: Province of Quebec. } In the Court of Queen's Bench. (Appeal Side.)

No. 267 In a cause between:

Dame Charlotte de Hertel, of the City of Montreal, widow of the late George E. Fenwick, in her quality of sole surviving Executrix of the last Will of the late Amelia Robertson, spinster, executed at Montreal before Lighthall and colleague, notaries, on the eighth October one thousand eight hundred and seventy-nine, and of the Codicil thereto before said notaries, on the fifth February one thousand eight hundred and ninety-one, (Opposant in the Court below) - - - - - - Appellant,

and

Dame Emily Charlotte Goddard, of the City of Montreal, widow of the late Alfred Edward Roe, as well in her capacity of Executrix, under the last Will of the said Alfred E. Roe, and Codicil thereto, whereof probate was granted by the Prothonotary of the Superior Court at Montreal, on the sixteenth August one thousand eight hundred and ninety-three, as in her capacity of Tutrix to her minor daughter Florence Roe, issue of her marriage with her said husband, appointed as such by *acte* of tutorship homologated at Montreal on the thirteenth September one thousand eight hundred and ninety-three, and Robert Craig of the same place, doctor in medicine, in his capacity of curator duly appointed by *acte de curatelle* homologated at Montreal, on the thirteenth day of September one thousand eight hundred and ninety-three, to the substitution created by the last Will and Testament of the said late Alfred E. Roe, (Intervenants *par reprise d'instance* in the Court below) - - - Respondents.

Be it remembered that on the twenty fourth day of April in the year of our Lord one thousand eight hundred and ninety-six at the City of Montreal, before me, the Honorable Mr. Justice Hall, one of the Justices of the Court of Queen's Bench for Lower Canada, came and appeared George H. Massy of Westmount, in the District of Montreal, civil engineer, and William D. Reid of the City and District of Montreal, contractor, who declare themselves jointly and severally bound and liable unto and in favor of the said Dame Emily Charlotte Goddard & al. *es qual.* their heirs, assigns and representatives in the sum of two thousand dollars current money of Canada, for costs, and in the sum of six hundred dollars said currency, to satisfy and costs to be made and levied of the several goods and chattels, lands and tenements of them the said George H. Massy and William D. Reid to the use of the said Dame Emily Charlotte Goddard & al. *es qual.*, their heirs, assigns and representatives, and more especially to be made and levied of the following real property belonging to the said George H. Massy, to wit: of five lots of land situated in the town of Westmount

RECORD.

In the Court of Queen's Bench.

No. 25. Bail Bond, filed 24 April 1896. — *continued.*

in said District known as lots sub-division numbers ninety-four, ninety-five, ninety-six, ninety-seven, and ninety-eight of the lot of land known and distinguished as lot official number three hundred and ninety-four of the official plan and book of reference of the parish of Montreal (384-94, 384-95, 384-96, 384-97, 384-98) being of the value of four thousand dollars and upwards, over and above all charges, hypothecs and incumbrances thereon.

Whereas judgment was rendered in the said cause in the said Court of Queen's Bench on the twenty-fifth day of February one thousand eight hundred and ninety-six, on the appeal instituted in this cause, and whereas the said Dame Charlotte de Hertel, *es qu l.* has obtained leave to appeal therefrom to Her Majesty in Her Privy Council;

Now the condition is such that if the said Dame Charlotte de Hertel *es qual.* do prosecute effectua ly the said appeal to Her Majesty, satisfy the condemnation and pay unto the said Dame Emily Charlotte Goddard & al. *es qual.*, her heirs, assigns and representatives, such costs and damages as may be awarded unto them by Her Majesty in the event of the said judgment of the said Court of Queen's Bench being confirmed, then the present obligation shall be null and void, otherwise the same shall be and remain in full force and effect.

And the said George H. Massy, and William D. Reid have signed.

G. H. MASSY,
W. D. REID.

Taken and acknowledged before me, at the City of Montreal, the day and year first above written, the said sureties having first duly justified as to their solvency.

ROBERT N. HALL, J. Q. B.

The said George H. Massy, being duly sworn, doth depose and say that he is the lawful owner and proprietor of the real estate described in the foregoing Bond, and that the same is worth the sum of two thousand six hundred dollars, current money of Canada, and upwards over and above all charges, hypothecs and incumbrances, and over and above what would pay his just and lawful debts, and he hath signed.

G. H. MASSY.

Sworn before me, at Montreal, this twenty-fourth day of April one thousand eight hundred and ninety-six.

ROBERT N. HALL, J. Q. B.

The said William D. Reid, being duly sworn, doth depose and say that he is worth the sum of two thousand six hundred dollars, current money of Canada, and upwards over and above all charges, hypothecs and incumbrances, and over and above what would pay his just and lawful debts, and he hath signed.

W. D. REID.

Sworn before me, at Montreal, this twenty-fourth day of April one thousand eight hundred and ninety-six.

ROBERT N. HALL, J. Q. B.

(Endorsed.)

Bail-Bond in appeal to the Privy Council. Fyled 24 April, 1896.

(Paraphed) L. O., D. C. A.

In the Court of Queen's Bench.

No. 26. Fiat for Transcript, filed 15 July 1896.

DOCUMENT XI.

Canada, Province of Quebec. } Court of Queen's Bench. (Appeal Side.)

No. 267.

Dame Charlotte de Hertel, & al, *es qual.*, - - Appellant.

and

Dame Emily C. Goddard & al., *es qual.*, - - - Respondents.

We do hereby require the preparation of the Transcript on the Appeal in this cause to Her Majesty in Her Privy Council, the said Transcript to be printed here by Mitchell & Wilson, printers.

Montreal, 30th April, 1896.

CROSS & BERNARD,
Attorneys for Appellant.

(Endorsed)

Fiat for Transcript. Fyled 15 July, 1896.

(Paraphed) L. M., D. C. A.

No. 27. Consent of Parties as to the printing of the Transcript, filed 29 July 1896.

DOCUMENT XII.

Canada, Province of Quebec. } Court of Queen's Bench. (Appeal Side.)

No. 267.

Dame Charlotte de Hertel, *es qual.*, - - - Appellant.

and

Dame Emily C. Goddard & al. *es qual.* - - - Respondents.

We hereby consent that the Transcript in Appeal to Her Majesty in Her Privy Council be printed here, and that the costs of the preparation, and printing the same, and of its transmission to the Registrar of the Privy Council, be taxed by the Clerk of Appeals.

Montreal, 30th April, 1896.

CROSS & BERNARD,
Attorneys for Appellant.
LAFLEUR & MACDOUGALL,
Attorneys for Respondent.

(Endorsed)

Consent of Parties. Fyled 29 July, 1896.

(Paraphed) L. M., Dep. C. A.

RECORD.

In the Court of Queen's Bench. | *In the Superior Court.*

No. 28. Index of all the papers comprising the original Record.

INDEX of all the PAPERS comprising the ORIGINAL RECORD.

We, William E. Duggan and Joseph Olivier Joseph, Q.C., Clerk of Appeals of Her Majesty's Court of Queen's Bench for Lower Canada, do hereby certify that the foregoing and present pages from page one to page seventy-two, of the foregoing Transcript Record contain true and faithful copies of all and every the original papers, documents, and principal proceedings, and of the Transcript of all the Rules, Orders, Proceedings and Judgments of Her Majesty's Superior Court for Lower Canada, sitting in the City of Montreal, in the Province of Quebec, transmitted to the Appeal Office in the said City of Montreal, as the Record of the said Superior Court, in the cause therein lately pending and determined, wherein Dame Charlotte De Hertel, *es qual.*, Opposant in the said Superior Court, was Appellant in the said Court of Queen's Bench (Appeal Side) and Dame Emily Charlotte Goddard & al. *es qual* Intervenants *par reprise d'instance* in the Superior Court, were Respondents in the said Court of Queen's Bench (Appeal Side), and also of all the proceedings and documents had and fyled in the said Court of Queen's Bench (appeal side), and of all and every the entries made in the Register of the said Court of Queen's Bench, and of the Judgment therein given on the Appeal instituted before the said Court of Queen's Bench, by the said Dame Charlotte De Hertel *es qual.*

In faith and testimony whereof we have to these presents set and subscribed our signature and affixed the seal of the said Court of Queen's Bench (Appeal Side).

Given at the City of Montreal, in that part of the Dominion of Canada, called the Province of Quebec, this twenty-first day of August, in the year of Our Lord one thousand eight hundred and ninety-six.

DUGGAN & JOSEPH,
Clerk of Appeals.

[L. S.]

RECORD.

In the Court of Queen's Bench.

No. 30. Certificate of Chief Justice.

I, the undersigned Sir Alexandre Lacoste, Knight Chief Justice of the Court of Queen's Bench for Lower Canada, do hereby certify that the said William E. Duggan and Joseph Olivier Joseph, Q.C., are the joint Clerk of the Court of Queen's Bench, on the Appeal Side thereof, and that the signature "Duggan & Joseph," subscribed at the foot of each of the foregoing pages and of the certificate above written, is their proper signature and handwriting.

I do further certify that the said Duggan & Joseph, as such Clerk, are the Keeper of the Record of the said Court, and the proper Officer to certify the proceedings of the same (Appeal Side), and that the seal above set, is the seal of the said Court on the Appeal Side, and was so affixed under the sanction of the Court.

In testimony whereof, I have hereunto set my hand and seal, at the City of Montreal, in the Province of Quebec, the day of August, in the year of our Lord one thousand eight hundred and ninety-six, and of Her Majesty's Reign the fifty-ninth.

A. LACOSTE,
Chief Justice, Queen's Bench,
Province of Quebec.

[SEAL.]

JUDGES' REASONS.

Notes of Mr. Justice Doherty in the Court of Review.

The decision of this case turns upon the interpretation to be given to the following disposition, or rather to the second paragraph of the following disposition of the Will of the late William P. Christie:

"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 "and entire property, share and share alike, all and every the tract and parcel "of land called and known as the Seigniory de Lery, situated and being in the "said province, &c.

"And I desire if two of three persons—Mary Robertson, Amelia Robertson "and Mary Elizabeth Tunstall shall die without such children, that the said "tract, part or parcel of land, &c., 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, &c., shall go to "(certain benevolent societies)

Did this second paragraph create, as between Mary and Amelia Robertson and Mary Elizabeth Tunstall, a gradual substitution, under which the share of any one of them dying without children would pass to the other two, and upon the death of a second of them also without children, the whole would vest in the third, to be by her handed over to her children, if any she had, or in default of such children, to the different charities named, or, was any substitution thereby created, as regards the respective shares of said three legatees, dependent upon and to take effect only upon the fulfillment of the condition that *two* of them should die childless.

The Court of first instance interpreted the will as creating such a gradual substitution between these three persons, not in express terms, but by necessary intendment, and therefore held that the property having at the death of the testator passed to Catherine Robertson, as institute, and upon her death to Mary and Amelia Robertson and M. E. Tunstall as substitutes in the first degree, and Mary having died leaving no children, her share or $\frac{1}{3}$ of the property bequeathed, passed to Amelia Robertson and M. E. Tunstall, as substitutes in the second degree, and, the degrees of substitution permitted by law being thereby completed, being their absolute property each for $\frac{1}{2}$ of such $\frac{1}{3}$ or $\frac{1}{6}$ of the entire property. In consequence the opposition of Opposant, claiming to be as universal legatee of Amelia Robertson, who also died childless, proprietor of $\frac{1}{6}$ of the Seigniory in question was maintained.

The Intervenant was the only child of M. E. Tunstall, the third of the above-mentioned legatees, and as such, by his intervention claimed to be, under

RECORD.

Judges' Reasons.

Notes of Honorable Mr. Justice Doherty in the Court of Review. —*continued.*

the terms of the will, the sole owner of the entire Seigniory. He having died *pendente lite*, his legal representative, the Intervenant *par reprise d'instance*, inscribes in review of this judgment. In support of her inscription she urges, in her factum, two grounds namely :—

1o. Under the law when the will was made (1842) and took effect by the death of the testator (1845) there was no limitation as to the number of degrees to which a testator could substitute property bequeathed by him, and

2o. Even if such limitation existed, and if substitution created by will were by the law then in force limited to two degrees beyond the institute, the law governing the manner in which such degrees should be counted was article 124 of the Ordonnance of 1629, and under that article Mary and Amelia Robertson and M. E. Tunstall, having taken the property jointly and concurrently, formed and should be counted as but one degree of the substitution, and the entire property consequently passed to Intervenant, as the sole child of the survivor of said joint legatee—her co-legatees having left no children as substitute in the second degree.

At the argument it was further contended on behalf of Intervenant *par reprise* that under the true interpretation of the clause of the will in question there was, at the death of Mary Robertson, no transmission of her share to Amelia Robertson and M. E. Tunstall, that, the will providing for no further substitution, in the event of but one of the three substitutes in the first degree dying childless, and making such provision only in the event of two of them so dying, on the death of Mary, it being still uncertain whether the condition upon which any further substitution of her share depended, namely, the death of one of the two surviving co-legatees without children, would be fulfilled, her share vested in her lawful heirs, and remained as vested in them pending the fulfillment of said condition, which while it operated as a suspensive condition so far as regards any further substitution of her share, constituted as regards the rights so vested in her heirs, a resolutory condition, or one upon whose fulfillment their right would be dissolved that in consequence the share of Mary Robertson did not pass under the substitution at all, until the death of Amelia, which, she being childless, fulfilled the condition, and, of course passed for no part to her, but either to M. E. Tunstall, Intervenant's mother or directly to the Intervenant himself; in the first case, she taking as substitute in the second degree as regards the shares of both her co-legatees, and transmitting to him as her heir, or, in the second case, he taking the shares of the two deceased co-legatees of his mother, as substitute in the second degree, and in any case, Amelia never having had any right whatever in Mary's share, and Opposants being consequently without right, and this even if the other pretensions of Intervenant as to the limitation or rather non-limitation of degrees of substitution, and as to the method of counting such degrees should be unfounded.

This is manifestly the first question calling for solution, for if under the will, the share of Mary Robertson did not at her death pass to Amelia Robertson and M. E. Tunstall, then no portion of it ever passed to Amelia at all, and Opposant, as legal representative of the latter, has clearly no right in the property in question, even assuming that under the law at the period when the will was made and took effect, substitutions were limited to two degrees beyond

the institute, and that such transmission of Mary's share to her co-legatees should—had it taken place—be counted as filling one degree in the substitution.

Now the will does not by its terms expressly provide that on one of the three co-legatees dying without issue, her share should pass to the other two. What is contended for and what was held by the Court of first instance, is that such a proviso must be read into the will, as being manifestly and necessarily intended by the testator, it being impossible, it is said, for the purpose of the testator that the property should pass as a whole to the children of the third in the event of two dying without children, to take effect, unless on the death of one without children her share pass to the survivors. But is there any such impossibility? Was not the testator free, if he so desired, to create substitution which would take effect only upon the fulfillment of a condition other than the death of the institute, and which might be fulfilled only after her death, and must we necessarily find some one who *under the will* shall be *grevé* pending the fulfillment of this condition? It appears to me clear that the testator had such liberty, and that if he exercised it, we are under no obligation to find a person who shall be *grevé* during the period elapsing between the death of the institute and the happening of such condition.

Article 963 C. C., provides expressly for such a case, and enacts that where, by reason of a pending condition or some other disposition of the will, the opening of the substitution does not take place immediately upon the death of the institute, his heirs and legatees, continue till the opening to exercise his rights, and remain liable for his obligations. In other words, with regard to the property substituted, as with regard to all his property, the heirs and legatees of the institute, as continuing his person, hold it as he held it. If the suspensive condition be fulfilled, they must fulfill his obligation of handing over the property substituted; if it fail, they remain absolute proprietors. So that, if at the death of Mary Robertson any further substitution of her share depended on a condition not yet fulfilled, we are not bound to supply a *grevé* to hold the property pending the fulfillment of the condition. Under 963 it vested in her heirs, subject to the obligation on their part to hand it over on fulfillment of the condition. And it may be observed, inasmuch as it is claimed that this particular case is to be governed by the old law and not by the Code, that this article is the mere reproduction of the old law. (*Thevenot d'Essaule*, chap. XXX *Pothier*, subst. 206, 563.)

Now does the will make the further substitution of the share of the one of the three co-legatees who might first die without children, dependant upon a suspensive condition which might not be and indeed could not be accomplished till after her death? It seems to me it did. The condition was that *two of the co-legatees* should die without children. This condition was not and could not be fulfilled until after the death of the one dying first. In this case Mary died first leaving no children. It was then uncertain whether or not the condition of the will would be fulfilled, and as a consequence no substitution opened. When Amelia died also childless, then and then only the condition was fulfilled, and then only, the condition being fulfilled, did both her and Mary's share come under the effect of the substitution of the whole created in favor of the children of the third, and then only was there any transmission of Mary's

RECORD.

Judges' Reasons.

Notes of Honorable Mr. Justice Doherty in the Court of Review. —*continued.*

share to a substitute in the second degree (*Thevenot d' Essaule,* 497 &c.), if indeed it passed then, and if its transmission was not still suspended awaiting the ascertainment of whether the third of the co-legatees should at her death leave a child or children, in which case the property as a whole would go to such children, or whether she too would die childless, in which case it would pass to the charitable institutions mentioned. I deem it unnecessary to go into the latter question, its solution is unnecessary to the decision of the present case. If the share of Mary was not transmitted in virtue of the substitution till after the death of Amelia, certainly no portion of it was transmitted to her as a *grevé de substitution*, or as substitute.

As has been said the judgment *a quo* rests not on anything expressed in the will to justify the holding that on Mary Robertson's death her share passed to her co-legatees, but upon the necessity of completing the will by intendment and of finding some person in whom the property should vest pending the fulfillment of the condition. It is supported by the citation from *Thevenot d'Essaules*, of an example given by him of the case where a testator bequeathing an object to two persons charges the survivor of them to hand over the whole to a third person—in which case the author holds there is necessarily implied a substitution of the share of him who dies first in favor of the survivor, as otherwise the latter could not deliver over the entirety. The difference between the case cited by the author and the present case seems to me very great. That difference results from the fact that in the cases given by the author the obligation to hand over the whole is imposed absolutely on the survivor, and the transmission must therefore necessarily by supposed, whereas in this case the obligation is dependent on a certain condition, and, unless that condition is fulfilled, there being no obligation imposed on the survivor to hand over, until that condition be fulfilled, there arises no necessity for supposing any transmission to such survivor of the shares of the co-legatees. In other words, whereas in the cases supposed the survivor as survivor is bound to hand over the whole, and there must necessarily as survivor receive the whole, in our case it is only in the case where the two pre-deceasing have so pre-deceased without children, that the survivor is so bound, and consequently only in that case that transmission to such survivor must necessarily be supposed to take place.

In our case, too, it does not appear, though the term *survivor* is used as describing the one who alone of the three co-legatees might die leaving children, that it was the child or children of the survivor as such who were to take, but the child or children of the one who alone might have children,—and it seems to me that the right of such child or children would not have been affected by the circumstances, had it happened, that their parent died first or second instead of last of the three co-legatees. If this be so, had Mary Tunstall died first instead of last of the three co-legatees, her child would have under the will equally been called to take the whole, though manifestly it would have been impossible, in that case, to suppose any system of transmission of the shares of her two co-legatees to her. Or again, had the first two who died left children and the survivor alone been childless, where in the will is there to be found any substitution of the share of the legatee so dying childless, or how could it be created by means of a supposed intention on the part of the testator that the

share of such legatee should pass to her co-legatees? Had this happened any substitution as to the share of such co-legatee, it seem to me, would necessarily have lapsed, and I see no reason to suppose that the testator wished,—had but one of the co-legatees died childless,—to create a substitution as to her share, had she died first, and not to do so, if she died last.

Morever, is not the supposed intended gradual substitution excluded by the fact that the testator specially provided for a substitution in the event of two of the co-legatees, or all three dying childless, and refrained from doing so in the event of only one so dying? Is not the inference rather that he did so intentionally, and meant that there should be no substitution if only one died childless, than that he meant that there should be such substitution in the latter case? Why should we suppose that he meant what he didn't say, rather than what he did say? And why particularly should we suppose the necessary intention on his part to create this extra degree of substitution, when the direct effect of so doing is by means of the interposition of this supposed intended degree, to render nugatory the clearly expressed intention, the unmistakable purpose of the testator, that if two of these three co-legatees died childless, the whole property should go to the child of the third. And yet this is the effect of supplying this unexpressed intention here. By doing so, you, out of a desire to be sure not to fail to execute a supposed intention of the testator which he was careful not to express, succeed in defeating his unmistakably expressed desire.

Furthermore, even if we are not bound to presume that every man knows the law, it does not seem to me that we are bound to suppose that this testator did not know it. The will before us is one disposing of a vast fortune. It does not appear to me a very violent presumption to suppose that the testator or whoever drew this will was aware that he could not create a substitution which would have effect for more than two degrees beyond the institute. If we suppose that he did know it, then should we not suppose that inasmuch as his unquestionable purpose was to so arrange matters that if two of these persons died without issue, the whole property should go to the child of the third, he intentionally avoided creating an unnecessary degree of substitution which he knew would render it quite possible that his purpose would be defeated? It seems to me that if the testator knew that he could not effectually substitute beyond two degrees, then we have the reason why he refrained from creating the gradual substitution, which the opposant would have us read into his will, in order to defeat his expressed desire. I find it difficult to suppose that the testator necessarily intended to try to do what the law would not permit him to do, rather than to arrive at his end by means which the law did allow, and which more fully secured the execution of his unmistakeable desire.

It is true that this reading of the will subjected the desire of the testator to substitute the property as a whole to the risk of being defeated as regards one-third had but one of the institutes died childless,—but, on the other hand, it has the advantage of preventing the main purpose, namely, the substitution of the whole property in favor of the family of one should the substitution become possible by the death of two childless, from being defeated by the interposition of a degree of substitution which the testator did not expressly provide

RECORD.

Judges' Reasons.

Notes of Honorable Mr. Justice Doherty in the Court of Review. —*continued*

for,—and which the Court is only asked to read into his will for the purpose of defeating the testators's manifest intention.

It seems to me that under these circumstances it cannot be said that the testator necessarily intended to create a gradual substitution between Mary and Amelia Robertson and M. E Tunstall as regards their respective shares, in the event of but one of them dying childless, and that, even if this be doubtful, the Court should rather interpret what may be ambiguous in the will in such manner as to effectually attain the end which the testation clearly expressed, than by means of suppositions of intention on his part to do something which the law would not allow, to arrive at the defeat of his manifest purpose to attain an end in itself perfectly lawful.

I hold, therefore, that the share of Mary Robertson at her death did not, under the will, pass to her co-legatees, that Amelia and Dame Tunstall did not then take that share as substitutes, and that Amelia therefore never had any interest therein as such substitute, and could transmit no right therein to opposant, her legatee.

I concur in reversing the judgment and dismissing the opposition; as the ground on which I do so is not taken in Intervenant's pleadings, would do so without costs in the Court below, but with costs in Review, for the reasons above given,—though, were it necessary to Intervenant's case to hold what he pleaded, namely, that the bequest in question constituted a bequest of the usufruct and did not create a substitution, I would be against him.

Taking the view I did upon this pretension, it is unnecessary for me to deal with the other questions raised by Intervenant in this factum.

Notes of Honorable Mr. Justice Loranger in the Court of Review.

NOTES OF MR. JUSTICE LORANGER IN THE COURT OF REVIEW.

L'opposante, légataire universelle de feue Dame Amelia Robertson, réclame un sixième de la Seigneurie de Léry.

Amelia Robertson était elle même avec sa sœur Mary Robertson et sa cousine Elizabeth Tunstall légataire universelle en usufruit de feu William P. Christie décédé en Irlande le 4 mai 1845. C'est le testament olographe de ce dernier fait en Angleterre (31 mars 1845) qui fait l'objet du présent litige.

La clause que la Cour de première instance a l'interprétée en faveur de l'opposante et qu'il s'agit d'interpréter à notre tour est la suivante :—" I give, de-
" vise and bequeath to the said Catherine Robertson of Montreal, widow, during
" her natural life, and after her death to her daughters Mary and Amelia Rob-
" ertson, 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 pro-
" perty share and share alike, all and every the tract and parcel of land called
" and known as the Seigniory de Lery, situate and being in the said province
" &c. . . . .

" And I desire, if two of the three persons—Mary Robertson Amelia Rob- " ertson 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 shall be " sold, and the proceeds thereof be equally divided among the Prayer Book and " Homily Society, the Reformation Society, the Protestant Association, and the " Lord's Day Society, all of London."

Au décès du testateur, Catherine Robertson a recueilli le legs et a joui de la Seigneurie de Léry jusqu'à son décès ; et après elle, les dites Amelia et Mary Robertson ses deux filles en ont également joui conjointement avec sa nièce Elizabeth Tunstall, jusqu'à la mort de Mary Robertson qui est décédée sans enfants et a transmis sa part à ses deux co-légataires, qui en ont eu elles aussi, la possession conjointe. Amelia Robertson est décédée la 8 février 1891, sans enfants, après avoir fait un testament par lequel elle a institué l'opposante Dame Charlotte de Hertel, sa légataire universelle. Elizabeth Tunstall la dernière survivante des légataires usufruitières de feu William P. Christie, est décédé, laissant un enfant issu de son mariage avec feu Edward Roe, savoir: l'intervenant en cette cause.

L'opposante prétend que Catherine Robertson, la première instituée a reçu la Seigneurie de Léry avec charge de la transmettre aux trois légataires instituées après elle, savoir, ses deux filles Mary et Amelia Robertson et sa mère Elizabeth Tunstall ; qu'à son décès ces dernières on été investies de l'héritage chacune pour un tiers; qu'à la mort de Mary Robertson sans enfants son tiers est passé aux deux survivantes qui en son devenues propriétaires incommutables; et comme conséquence que Amelia Robertson, avait le droit de disposer comme elle l'a fait, de la moitié de ce tiers, la substitution finissant avec elle ; en d'autre mots, que les trois légataires—Mary, Amelia Robertson, et Elizabeth Tunstall ont formé le premier dégré; qu'au décès de la première, Mary Robertson, sans enfants, les deux survivantes Amelia Robertson et Elizabeth Tunstall ont recueilli sa part comme appellées aux deuxième degré; que la substitution fut épuisée pour cette part, dont Amelia Robertson a disposée en faveur de l'opposante par son testament du 8 octobre 1879.

De son côté, l'intervenant soutient qu'il n'y a eu qu'un legs d'usufruit en faveur de Catherine Robertson sa vie durante, et après son décès, en faveur des trois autres légataires pour en jouir conjointement, par parts égales, leur vie durante, la propriété devant retourner à leurs enfants nés en légitime mariage ; qu'au décès de Mary Robertson, sans enfants, sa part est dévolue par droit d'accroissement aux deux survivantes qui n'en ont joui, comme elle en jouissait elle qu'à titre d'usufruitières, avec charge de transmettre la nue propriété de cette part suivant le désir du testateur ; que, au décès de Amelia Robertson décédée elle aussi sans enfants, Elizabeth Tunstall la dernière survivante, s'est trouvée investie de la totalité de l'usufruit, avec charge de transmettre la nue propriété à son enfant l'intervenant né en légitime mariage, ainsi que l'a voulu le testateur qui a prévu le cas où deux des dites trois légataires décèderaient sans enfants.

RECORD.

Judges' Reasons.

Notes of Honorable Mr. Justice Loranger in the Court of Review. —*continued.*

En résumé, la prétention de l'intervenant sur la possession qu'ont eue Amelia Robertson et Elizabeth Tunstall ne constitue pas un degré de substitution ; mais qu'au contraire le second degré, en vertu du testament n'a été atteint que par l'avénement de la condition qui devait donner ouverture à la transmission de la nue propriété c-a-d, le décès de la dernière survivante des trois légataires usufruitières.

Le jugement *a quo* adoptant la décision de la Cour d'Appel *re Cuthbert* vs. *Jones* a maintenu les prétentions de l'opposante, et l'intervenant se pourvoit en Révision.

Sans entrer dans le mérite de la question jugée dans *Cuthbert* vs. *Jones* il suffira de dire qu'il n'y a pas analogie entre les deux cas et que les règles d'interprétation à la lumière desquelles il faut juger celui qui nous est soumis ne sont pas du tout les mêmes. La Cour d'Appel (2 M. L. R., Q. B., p. 44) confirmant un jugement de l'Honorable Juge Mathieu (2 M. L. R., C. S., p. 23) a maintenu que sous l'ancien droit la loi et la jurisprudence limitaient les substitutions à deux degrés outre l'institué; que les degrés de substitution se comptent par têtes et non par souches et que lorsque la part de l'un de ceux qui ont recueilli conjointement passe aux autres cette transmission constitue un degré additionel quant à cette part. Les deux cours expriment l'opinion que le statut Impérial de 1874 et l'Acte Provincial de 1801 qui accordent la liberté illimitée de tester, n'ont pas eu l'effet d'abroger ces dispositions de l'ancien droit, et que les substitutions sont restées limitées depuis, comme elles l'étaient auparavant. Elles ont suivi l'opinion de Sir Hypolite Lafontaine *re Blanchet* vs. *Blanchet* (11 L. C. R., p. 220) contredite depuis par les Codificateurs, (5ème Rapp. p. 90) qui ont introduit, comme droit nouveau, l'article 932 de notre Code Civil; et pour ma part, malgré le respect que je professe pour l'opinion des cours qui depuis ont jugé le contraire, je serais porté à adopter les vues de Codificateurs et à reconnaître à l'acte de 1601 une signification et une portée plus étendues qu'elles ne l'ont fait. Mais la discussion sur ce point serait oiseuse, sans intérêt dans la cause actuelle et sans nouveauté.

Ce que nous avons à chercher d'abord, c'est de savoir quelle a été la volonté du testateur et cette volonté, une fois connue, de lui donner ses effets en appliquant les principes du droit en semblable matière.

C'est une règle constante, dit *Thevenot*,—Traité des Substitutions, annoté par Monsieur le Juge Mathieu, No. 248, que la volonté du disposant est la loi suprême dans les fidéi-commis. C'est au juge qu'il appartient de la faire respecter et d'empêcher qu'elle soit, sous aucun prétexte, frustrée par des fictions de la loi ou une interprétation rigoureuse de règles ou de principes applicables dans les cas douteux; car alors on doit présumer que le testateur n'a pas voulu s'écarter de l'ordre ordinaire des successions. Mais lorsque le testateur a réglé lui-même sa succession, désigné son héritier, en imposant, comme dans le cas actuel, des conditions qui ne laissent aucun doute sur la personne qu'il a voulu gratifier comme nue propriétaire, le devoir du Juge est facile, il n'a qu'à déclarer ce que le testateur a dit et non ce qu'il a voulu dire; et cela sans violenter aucun principe ni aucune règle d'interprétation, car nulle part, trouverait-on que la volonté nettement exprimée d'un testateur, puisse être, en aucun cas, détruite par l'opération de la loi quand les conditions qu'il a imposées pour son exécution, ne sont contraires ni aux bonnes mœurs ni à l'ordre public.

Or, quelle est la position dans le cas actuel? William P. Christie, lègue à Catherine Robertson sa vie durante et après elle, à ses deux filles et à sa mère conjointement pour en jouir par part égale, aussi leur vie durante et après leur décès leurs enfants en propriété, en cas du décès de deux d'entr'elles sans enfants, la propriété retourne aux enfants de la survivante. Y-a-t-il là, legs de l'usufruit d'une part et de la propriété d'autre part, ainsi que l'intervenant le soutient? A cela on oppose la règle que la propriété ne peut pas être en suspens. Ce n'est pas une réponse car il n'y a pas suspension de la propriété, elle aurait reposé, comme dans tous les cas d'usufruit, sur les héritiers que le testateur a désignés pour recueillir la nue propriété. Quels étaient ces héritiers? Le testateur les a indiqués: 1o. Les enfants des usufruitières. 2o Certaines sociétés de bienfaisance au cas de non survivance d'enfants. Y-a-t-il dans cette disposition du testament, quelque chose qui répugne à la loi ou à l'ordre public? Je ne le crois pas Examinée sous cet aspect, la cause de l'opposante ne me paraît pas soutenable. Il me paraît de toute èvidence que Mary et Amelia Robertson de même que leur mère Elizabeth Tunstall n'ont jamais eu autre chose que la jouissance de la Seigneurie de Léry, et que feu William P. Christie n'a pas voulu leur conférer un droit dans la propriété même; que la part d'usufruit de Mary Robertson la première décédée, est accrue à ses co-légataires soit par le droit d'accroissement en vertu de la disposition même du testament, soit par la simple opération de la loi; car ses co-légataires, Amelia Robertson, et Elizabeth Tunstall étaient elles mêmes ses héritières; or elles n'ont pu posséder que ce que leur auteur possédait elle-mème et avec les mèmes charges et obligations. S'il n'y a eu que don de l'usufruit d'un côté et de la propriété de l'autre, elles ont reçu à simple titre d'usufruitières avec les charges ordinaires de l'usufruit, jusqu'à son extinction, survenue par le décès de la dernière d'entre-elles, Elizabeth Tunstall, mère de l'intervenant. Si au contraire, elles ont possédé à titre de grevèes, ainsi que l'opposante le soutient, la conséquence me paraît la même. Le testateur a voulu que dans le cas où deux des dites légataires en usufruit décèderaient sans enfants, la propriété de la Seigneurie de Léry passât aux enfants de la dernière survivante. Jusqu'à ce que cette condition, savoir le dècès de deux d'entre elles sans enfants; fut accomplie, Mary et Amelia Robertson n'ont pu acquèrir aucun droit absolu à la propriété du fonds mème, étant obligées de rendre aux enfants de la survivante d'entr'elles, elles n'auraient été à tout évènement que propriétaire sous une condition résoluble, et comme conséquence, toute aliénation ou disposition soit par donation ou par testament qu'elles auraient faites du fonds mème, auraient été sans effet à l'ouverture de la substitution. Amelia Robertson a recueilli la moitié de la part de sa sœur Mary, avec charge de rendre à ses enfants et à leur défaut à ceux de Mary E. Tunstall. Le legs fait à ses enfants n'a pas été recueilli par eux; qui doit recueillir à leur place, si ce n'est la personne que le testateur a désignée lui-même? N'y a-t-il pas là, quant à ce qui régarde la part de Mary Robertson, le caractère de la substitution compendieuse, qui réunit tous les éléments de la substitution vulgaire et du fidei-commis ordinaire? Rien ne fait voir que l'intervenant fut né ou capable de recueillir, au décès de sa tante Amelia Robertson et on objecte que dans ce cas la propriété serait restée en suspens. La réponse s'impose d'elle-même; la propriété aurait reposé sur la tête de l'héritière de Amelia Robertson, qui n'était autre que la mère de l'intervenant dont il a hérité.

RECORD.

Judges' Reasons.

Notes of Honorable Mr. Justice Loranger in the Court of Review.
—*continued.*

Mais il est un autre aspect de la cause également favorable à l'intervenant, même en admettant qu'il y a eu une substitution fidei-commissaire ordinaire, et que la décision de la Cour d'Appel dans la cause de *Joseph* vs *Castonguay* doive être suivie (8 *Jurist*, pag. 621). Car pour donner effet à sa volonté le testateur a statué qu'il y aurait accroissement de l'usufruit, au profit des légataires entr'eux en cas de caducité, et il y aurait lieu d'appliquer l'Art. 868 C. C. Qu'il y ait lieu à l'accroissement en matière de substitution lorsque le testateur a voulu qu'il en soit ainsi, la chose est certaine, et le contraire n'a pas été soutenu à l'audience.

En vertu du testament, l'usufruit appartient d'abord à Catherine Robertson ; le testateur a détaché l'usufruit de la propriété et restreint les droits de celle-ci à la jouissance seulement de la Seigneurie de Léry ; puis il a déclaré qu'à son décès cette jouissance serait réversible sur la tête des trois autres légataires conjointement, pour en jouir leur vie durant ; la nue propriété devant retourner à leurs enfants ; et voulant manifester aussi clairement que possible son intention de ne transmettre la propriété même, qu'aux enfants de ces trois légataires et de ne pas permettre qu'aucune partie en soit distraite au profit d'autres qu'eux, il ajoute que *dans le cas ou deux d'entre les dits légataires décèderaient sans enfants, la propriété retournera aux enfants de la dernière survivante.*

Le testateur, ne pouvait pas déclarer d'une manière plus précise et plus nette, son désir de maintenir dans la famille, dans toute son intégralité, l'héritage qu'il a légué. Il a prévu le cas de caducité pour cause de non survenance d'enfants ; ce qui éventuellement pourrait détourner de cette famille une partie de son patrimoine ; puisqu'aux termes de l'Acte de 1801, Amelia Robertson, si la prétention de l'opposante est fondée en loi, pouvait disposer de sa part en faveur d'étrangers.

Voulant éviter ce détournement, le testateur a ordonné qu'il y aurait accroissement d'usufruit en faveur des légataires en usufruit au cas de décès sans enfants. Il avait le droit et le pouvoir d'en agir ainsi. La volonté du testateur est la loi suprême dans le fidei-commis, comme je viens de le dire. William P. Christie, pouvait, en gratifiant ses légataires, ordonner, qu'en cas de décès de l'un d'eux sans enfants, avant l'ouverture de la substitution, sa portion resterait soumise à la substitution qu'il a établie en faveur des enfants de la dernière survivante ; et le mode le plus efficace et le seul comme le plus propre à empêcher le démembrement des biens legués avant l'ouverture de la substitution, était celui qu'il a choisi, c'est-a-dire l'accroissement au profit des co-légataires comme des appelés, de la part de chacun de ceux qui décèderaient sans enfants Qu'il eût le pouvoir de régler ainsi sa succession, la chose n'est pas douteuse. Le droit d'accroissement est fondé sur la volonté présumée du testateur, dit *Troplong* (Donations, test. No. 2191). *Demolombe*, vol. 25, No. 385, commentant les articles 1044 et 1045 dont l'art. 878 n'est que la reproduction, dit que ces articles n'ont rien d'impératif et sont fondés sur la volonté présumée du testateur ; et que par conséqrent sa volonté, quand il est reconnu qu'elle est contraire, doit l'emporter sur la présomption de la loi. C'est de quoi dit *Furgole* tous les auteurs deviennent d'accord. D'où il resulte cette double conséquence ; d'une part le legs qui d'après les articles 1044, 1045 devait produire le droit d'accroissement, ne le produira pas, si le testateur l'a défendu. D'autre part le legs qui

ne devait pas produire le droit d'accroissement le produira si le testateur l'a ordonné.

Comment reconnaître cette volonté? C'est, disent tous les auteurs avec *Demolombe*, No. 361 du même volume, dans les termes dont il s'est servi et dans la manière dont il a conféré à plusieurs le legs de la même chose, qu'il faut la rechercher.

On objectera peut être qu'il n'y a pas eu accroissement parce qu'il y a eu assignation des parts attribuées à chacune des légataires, Mary et Amelia Robertson et Mary Tunstall. Le testateur a fait un legs conjoint et cela impliquait qu'il entendait les gratifier également, et les mots *equal share*, étaient de surabondance. Cependant pour lever tout doute, il a fait lui-même le partage en attribuant à chacune d'elles un tiers de l'usufruit. Est-ce là l'assignation de part qui empêche l'accroissement? Je ne le crois pas et les termes mêmes de l'article indiquent le contraire; "*l'indication de quote part égale dans le partage "de la chose par disposition conjointe n'empêche pas l'accroissement.*"

La doctrine sur ce point se trouve résumée dans *Troplong*, au traîté déjà cité No. 2174, et suivants; *Demolombe*, No. 371 et suivants; *Aubry & Rau*, vol. 7, pag. 535; c'est que le testateur ne doit être considéré comme ayant fait une assignation de part, de nature à exclure le droit d'accroissement, qu'autant que la fixation des parts, porte sur l'institution même des légataires, dont la vocation se trouve ainsi restreinte à une part déterminée de la chose léguée.

L'assignation de part qui ne porterait que sur l'exécution du legs ou le partage à faire entre les légataires, ne formerait point obstacle au droit d'accroissement. Si donc le testateur en léguant à diverses personnes, par une seule et même disposition, soit l'intégralité de la chose ou de plusieurs objets particuliers, soit l'universalité de ses biens, indique la portion dans laquelle ses co-légataires devront jouir des bien compris dans la disposition ou en faire le partage, cette déclaration n'empêche pas que le legs ne soit fait conjointement. C'est là, disent les auteurs avant tout, une question d'interprétation, et on ne saurait admettre dit *Demolombe*, No. 372, que le législateur ait voulu la trancher négativement, toujours et quand même, sans souci des termes du testament qui témoigneraient d'une volonté contraire.

Or, quels sont les termes du testament et quel sens leur donner? Le sens à donner est nécessairement celui qui est le plus propre à remplir le dessein et la volonté du testateur, qui étaient de garder dans sa famille la Seigneurie de Léry dans son entier et comment atteindre cet objet, si ce n'est en défendant qu'elle fut démembrée du vivant des légataires usufruitiers sous quelque forme ou prétexte que ce fut, aux moyens de fictions légales. Il a si bien voulu que la Seigneurie restât intacte pour être transmise aux nues propriétaires, qu'il a non seulement indiqué ces nues propriétaires, mais qu'il a indiqué qu'à défaut de survenance d'enfants, des trois légataires instituées, elle soit vendue et le produit distribué entre les propriétaires. Voulant rendre manifeste son intention qu'aucune partie de la Seigneurie ne passe en d'autres mains que celles qu'il a choisies lui-même, le testateur a désigné les personnes, dans le cas ou ses légataires usufruitiers ne laisseraient pas d'enfants. Si la prétention de l'intervenant est fondée, un tiers de la Seigneurie se trouverait avoir été détourné de sa source et cela par pure interprétation d'un point douteux et contesté du droit

RECORD.

Judges' Reasons.

Notes of Honorable Mr. Justice Loranger in the Court of Review. —*continued.*

qui régit la manière de compter les degrés en matière de legs conjoints comportant substitution. Et celà en présence d'une disposition qui ne laisse aucun doute sur la volonté formelle du testateur et quand la loi veut que cette volonté soit la loi suprême pour tous.

Pour ma part, interprétant comme je le fais, la volonté de William P. Christie, et ne trouvant dans nos lois, rien qui répugne à l'exécution de cette volonté, de la manière qu'il a lui-même choisie, je suis disposé à lui donner tout son effet, en rendant au fils de Mary Tunstall la portion du bien qui lui a été léguée, et que le testament de Amelia Robertson lui a enlevée.

Le jugement, suivant moi, est érronné, et devrait être infirmé avec dépens.

REASONS OF SIR ALEXANDRE LACOSTE, Knight, Chief Justice of the Court of Queen's Bench.

Charlotte de Hertel & al.

&

Emily Goddard.

In the Court of Queen's Bench.

Judges' Reasons.

Sir A. Lacoste, Knight, Chief Justice.

Les appelants réclament un sixième de la Seigneurie de Lery, en leur qualité d'exécuteurs testamentaires de Dame Amelia Robertson.

Toute la question, se résume à l'interprétation à donner au testament de Monsieur Christie. Le testateur a légué la seigneurie de Lery d'abord à Catherine Robertson, puis après la mort de celle-ci, à ses filles Mary et Amélia Robertson et à sa nièce, Mary Elizabeth Tunstall, par parts égales et après le décès de ces dernières, à leurs enfants. Il ajoute que, si deux des trois légataires, Mary Robertson, Amelia Robertson, et Mary Elizabeth Tunstall, meurent sans enfant, la seigneurie passera aux enfants de la survivante.

Mary Robertson est décédée la première, puis Amelia Robertson, les deux sans postérité. Mary Elizabeth Tunstall a laissé un fils, Alfred Roe, qui est représenté par les intimés.

La contestation est liée entre les représentants de Amelia Robertson et ceux de l'enfant de Mary Elizabeth Tunstall.

D'après les prétentions des appelants, la propriété serait passée d'abord à Catherine Robertson, puis, à sa mort, à Mary Robertson, Mary Elizabeth Tunstall, Amelia Robertson, à chacune pour un tiers, et, au décès de Mary Robertson, morte sans enfant, son tiers aurait été, pour moitié, (soit $\frac{1}{6}$) à Amelia Robertson et pour l'autre $\frac{1}{6}$ à Mary Elizabeth Tunstall. Dès lors, la substitution grevant le tiers de Mary Robertson se serait trouvée épuisée, la loi ne permettant pas qu'une substitution ne s'étende à plus de deux degrés outre l'institué (C. C. 932) et Amelia Robertson serait devenue propriétaire incommutable du $\frac{1}{6}$ lui venant de sa soeur et aurait transmis ses droits aux appelants.

D'autre part, les intimés soutiennent que le testateur n'a pas substitué la part de Mary Robertson en faveur de Amelia et de Mary Elizabeth Tunstall,

mais que cette part a été substituée, à défaut d'enfant de la pré-décédée, à l'enfant de la survivante des trois, c-à d, à l'enfant de Mary Elizabeth Tunstall.

Nous croyons que l'interprétation des intimés est la bonne.

Le testateur donne, en premier lieu, à Catherine Robertson (premier degré), en second lieu, aux deux filles de cette dernière et à sa nièce (second degré) et en troisième lieu, (les institués) aux enfants des secondes grevées et, à défaut d'enfant de deux d'entre elles, aux enfants de la 3e. survivante. Nous ne trouvons, nulle part, que la part de Mary Robertson doive aller aux deux autres grevées Amelia Robertson et Elizabeth Tunstall; ces dernieres n'ont pas pu invoquer, le droit d'accroissement, car le legs n'est pas devenu caduc ayant été recueilli par la légataire lors du décès du testateur, (C. C. 868). L'institution définitive contient une substitution vulgaire, c'est-à-dire à deux classes de personnes, la première, aux enfants de Mary et Amelia Robertson et de Mary Elizabeth Tunstall, et la seconde, aux enfants de la survivante des trois grevées ci-dessus dans le cas où les deux premières mourraient sans enfants. De plus, la substitution, dans ce dernier cas, est conditionelle, c-à-d., que les enfants de la survivante ne devaient recueillir qu'à la condition que les deux premières mourraient sans enfants. Ce genre de substitution est autorisé par l'article 929 (C. C.) dans les termes suivants : " La disposition qui sub-
" stitue peut être conditionnelle comme toute autre donation ou legs."

Mais, objectent les Appelants, sur quelle tête reposait la propriété, jusqu'à l'arrivée de la condition? Nous trouvons la réponse à cette question dans l'article 963 (C. C.) qui nous dit que si, par suite d'une condition pendante, l'ouverture de la substitution n'a pas lieu immédiatement au décès du grevé, ses héritiers et légataires continuent jusqu'à l'ouverture à exercer ses droits, c-à-d, que si la condition ne fut pas arrivée, les héritiers de Mary Robertson seraient restés propriétaires de sa part.

Nous croyons que le jugement, dont est appel, est bien fondé.

On nous a parlé d'une cause de Roe et de Hertel, où nous aurions confirmé le jugement de la Cour Supérieure qui considérait le legs fait à Mary Robertson, Amelia Robertson et Mary Elizabeth Tunstall, comme un legs conjoint d'usufruit sujet à accroissement. Notre attention n'a pas été appelée sur ce point; les deux parties admettaient, dans la plaidoirie, que c'était un legs conjoint d'usufruit, et la question, que nous avions à décider, se rapportait à la validité d'une transaction intervenue entre Roe, l'enfant de Mary Elizabeth Tunstall, et Amelia Robertson, transaction qui avait été exécutée en partie. Nous avons cru devoir maintenir l'acte, mais nous n'avons pas été appelés à examiner ni à decider la question qui nous est soumise dans la présente cause.

REASONS OF THE HONORABLE MR. JUSTICE WURTELE.

Mr. Justice Wurtele.

I concur in the Honorable Chief Justice's notes of judgment.

J. S. C. WURTELE,
Judge Queen's Bench.

In the Privy Council.

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 & AL., ES QUAL., - - - *Respondents.*

RECORD OF PROCEEDINGS.

MITCHELL & WILSON, Printers, 1727 Notre Dame Street, MONTREAL, CANADA.

Judgment

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dame Charlotte de Hertel es qual. v. *Dame Emily C. Goddard and another, from the Court of Queen's Bench for Lower Canada in the Province of Quebec (Appeal side); delivered* 31*st July* 1897.

Present:

LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.
SIR HENRY STRONG.

[*Delivered by Lord Macnaghten.*]

Having regard to the law of the province of Quebec in reference to substitutions created by will a question now arises as to the meaning and effect of a devise in the will of the late William Plenderleath Christie who died in 1845.

The devise is in the following terms:—

"I . . devise . . to . . Katherine "Robertson of Montreal widow during her "natural life and after her decease to her "daughters Mary and Amelia Robertson and "to her niece Mary Elizabeth Tunstall con- "jointly 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 . . . the "seigniory De Lery . . . in the . . . "Province of Canada . . . I desire if two "of the three persons Mary Robertson Amelia "Robertson and Mary Elizabeth Tunstall shall "die without such children that . . . the "seigniory . . . shall go and belong to the

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" child or children of the survivor in full " and entire property." And the testator then directed that if all three Mary Robertson Amelia Robertson and Mary Elizabeth Tunstall should die without such child or children the seigniory should be sold and the proceeds divided between certain religious societies named in the Will.

Katherine Robertson the mother of Mary and Amelia Robertson and the aunt of Mary Elizabeth Tunstall survived the testator and died in 1858.

Mary Robertson died without having been married in 1876.

Amelia Robertson died without having been married in February 1891.

Mary Elizabeth Tunstall the survivor of the three substitutes in the first degree married one Edward Roe and died in October 1891 leaving an only child Alfred Edward Roe who is now dead.

The Appellant is the representative of Amelia Robertson. In her right the Appellant claims to be entitled to one moiety of the share given to Mary Robertson for life or in other words to one sixth of the whole estate.

The Respondents who represent Alfred Edward Roe maintain that on the death of Mary Elizabeth Tunstall the estate in its entirety devolved on her only child Alfred Edward Roe.

It is not disputed that the French law in force in the Province at the time of the cession of the country prohibited more than three degrees in substitutions created by will. The law as declared in the Civil Code of Lower Canada is to the same effect. Article 932 provides that substitutions created by will " cannot extend to more than two degrees exclusive of the Institute." That Article however appears to be marked as new law. And the learned Counsel for the Re-

spondents intimated that they were prepared to argue that at the time when the will came into operation there was no restriction on the number of degrees in substitutions created by will. The contention which they proposed to raise was that during the interval between the commencement of the Act of 1801 (41 George III. cap. 4) and the 1st of August 1866 when the Civil Code came into force there was unlimited freedom of disposition by will. But their Lordships did not think it necessary to embark in so far reaching an inquiry in the present case.

Assuming for the purpose of the argument that only three degrees of substitution were permissible by law at the time when the testator's will came into operation how many degrees are to be reckoned in the transmission of the estate from the testator to Alfred Edward Roe in regard to the share of Mary Robertson? From Katherine Robertson the Institute to Mary Robertson is one degree. From Mary Robertson to Alfred Edward Roe apparently is not more than one degree. The learned Counsel for the Appellant however discover another degree in the interval between the death of Mary Robertson without issue and the opening of the succession in favour of Alfred Edward Roe. They contend that on the death of Mary Robertson without issue the share given to her for life passed by tacit substitution to Amelia Robertson and Mary Elizabeth Tunstall in equal shares.

It is certainly not unusual in the case of a gift to a class the members of which are to take for life with remainder to their children to find the benefit of survivorship attached to the gift in the event of one or more of the members of the class dying without issue. Often that is a very proper provision. It is one likely enough to commend itself to a person about to

dispose of his property by will if it does not defeat or interfere with some object he has in view. But you cannot introduce it by mere conjecture. There must be either express declaration or necessary implication. Here there is neither the one nor the other. The case is very different from those cases on English wills to which Mr. Blake referred where cross remainders must be implied in order to effectuate the testator's declared intention that the estate is to go over in its entirety. Here the Appellant desires that the share given to Mary Robertson should in the course of its devolution pass to the other two ladies in order that that portion of the estate may never reach its destination. There are two roads. One is blocked by the law which says that the journey must be completed in three stages if it is to be completed at all. Neither expressly nor yet by implication does the testator direct that road to be taken. The other fulfils all the conditions of the will. No doubt it involves a halt at one point of the journey. But that creates no difficulty. There is no intestacy. The law itself provides for the interval without suggesting that the provision is to count as a degree in the substitution. Article 963 which is admitted to be old law declares that "if by "reason of a pending condition or some other "disposition of the will the opening of the "substitution do not take place immediately "upon the death of the institute"—that is in the present case upon the death of Mary Robertson who became the institute in regard to the substitute who came next—"his heirs "and legatees continue until the opening to "exercise his rights and remain liable for his "obligations."

In the course of the argument some faint reliance was placed on the word "conjointly"

in the gift to the three ladies as pointing to accretion. But the word "conjointly" is not inapplicable to a gift of property in equal shares so long as the property remains undivided. It may perhaps be inferred from the use of the word in the gift to the three and its absence in the gift to their children that the testator desired to indicate that there was to be no partition before the property reached its final destination. However that may be, the word "conjointly" cannot neutralise or control the plain meaning of the words "in equal shares" by which it is immediately followed.

Their Lordships therefore have no hesitation in expressing their concurrence in the judgment of the Court of Queen's Bench which affirmed the decision of the majority of the Court of Review reversing the conclusion of the Superior Court.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The Appellant will pay the costs of the appeal.