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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

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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.*

RESPONDENTS' CASE.

RECORD.

10 1. This is an appeal from a judgment of the Court of Queen's Bench for
Lower Canada, Appeal Side, rendered 5th February, 1896, confirming a judg- p. 67,
ment rendered by the Superior Court for Lower Canada, sitting in Review at ll. 1-47.
Montreal, on the 19th June, 1895. The judgment of the Court of Review re- p. 5,
versed the judgment rendered by the Superior Court for the District of Montreal ll. 10-45.
on 8th June, 1894, and dismissed the opposition of the Appellant and another
Opposant now deceased, by which they sought to be declared to be the owners
of one-sixth of the Seigniori De Lery and of all the moneys representing the
indemnity for certain seigniorial rights connected with that Seigniori. The
judgment of the Superior Court had maintained the opposition and declared the
20 Opposants to be entitled to one-sixth of the Seigniori and of the indemnity for
such rights. pp. 51-53.

2. This opposition was issued from the Superior Court in Montreal, and pp. 6-8.
served upon the Receiver-General, who was the depositary of the moneys re-
presenting the indemnity due to the proprietor of the Seigniori De Lery, and
the conclusions of the opposition asked that the Opposants be declared the
owners of one-sixth of the Seigniori De Lery and that they should be paid
one-sixth of the indemnity deposited with the Government of Canada.

RESPONDENTS' CASE.

RECORD.

3. The opposition was made by the present Appellant and her late husband George E. Fenwick, acting in their quality of executors of the last will and testament of the late Amelia Robertson, whose alleged title to one undivided sixth of the Seigniory was based on the will of the late William Plenderleath Christie.

4. By his holograph will, dated 31st March, 1845, probated at Montreal, the late William Plenderleath Christie made the following bequest:—

p. 27,
ll. 5-29. “ 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 10
“ 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 of Canada, save and except the reservations hereinafter men-
“ tioned; and all and every the terriers, books, papers and maps belonging to
“ said Seigniory De Lery, 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 Lery, to- 20
“ gether 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 De Lery, 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 De Lery, the reservations hereinafter mentioned always excepted,
“ shall be sold and the clear proceeds thereof shall be equally divided among 30
“ the Prayer-book and Homily Society, the Reformation Society, the Protes-
“ tant Association, and the Lord’s Day Society, all of London.”

p. 18, l. 13. 5. William Plenderleath Christie, died on 4th May 1845. Katherine
Robertson, named in the said will, accepted the bequest made in her favor and
p. 18,
ll. 16-18. enjoyed the property bequeathed until the time of her death which occurred in
1858.

p. 18,
ll. 19-24. 6. After the death of Katherine Robertson, the three persons named in
the will, viz: Mary Robertson, Amelia Robertson and Mary Elizabeth Tun-
p. 43, l. 1. tall, enjoyed the property in question conjointly until the death of Mary
Robertson on the 9th October, 1876, from which date Amelia Robertson and 40
Mary Elizabeth Tunstall enjoyed the property jointly until the death of
p. 43, l. 22. Amelia on 8th February, 1891.

pp. 39-42. 7. Amelia Robertson by her last will and testament named the present
Appellant as her sole residuary legatee and appointed the Appellant and her
husband executrix and executor of her will.

8. Mary Robertson and Amelia Robertson died without issue; Mary Elizabeth Tunstall had one son Alfred Edward Roe, issue of her marriage with the late Edward Roe, and this son survived Mary and Amelia Robertson.

9. The Appellant's contention is that the above cited bequest created a substitution in which Katherine Robertson was institute in the first degree and Mary and Amelia Robertson and Mary Elizabeth Tunstall institutes in the second degree; that upon the death of Mary Robertson without issue one-third part of the Seigniorie devolved by tacit substitution to Amelia Robertson and Mary Elizabeth Tunstall, each of whom would thus receive a one-sixth
10 part of the Seigniorie from Mary Robertson. It is contended by the Appellant that the transmission of Mary's share constituted a third degree in the substitution and that, substitutions being limited to three degrees, each of the substitutes, Amelia Robertson and Mary Elizabeth Tunstall thereby became absolute owners of one-half of Mary's share of the Seigniorie. The one-sixth share acquired by Amelia Robertson from her sister Mary would thus be comprised in her testamentary dispositions and would entitle the Appellant, as the representative of Amelia Robertson, to claim the ownership of one-sixth of the Seigniorie De Lery.

10. The opposition made by the representatives of the late Amelia
20 Robertson was contested by means of an intervention filed in the case by the late Alfred E. Roe, since deceased, and now represented by the Respondents, who duly obtained permission of the Court to continue proceedings.

11. The grounds of the intervention were that under the terms of the will of the late William Plenderleath Christie the whole of the Seigniorie and seigniorial rights connected therewith devolved to the Intervenant Alfred E. Roe, who, according to the will, by the death of Mary Robertson and Amelia Robertson became the sole proprietor of the Seigniorie; that the Opposant had no right to claim any portion of said Seigniorie, and that Amelia Robertson could never dispose of any part thereof by her will inasmuch as she never had
30 any right of ownership in the property in question but merely a joint usufruct with Mary Robertson and Mary Elizabeth Tunstall.

12. The Opposant joined issue by filing a contestation and answer to the said intervention in which the pretensions set forth in the opposition are repeated.

13. The Superior Court gave judgment in favor of the Opposant, holding that the above cited clause in the will created a substitution in which Katherine Robertson was institute and Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall were substitutes in the first degree; that at the death of Mary Robertson, without children, her share went by necessary intendment of
40 the will in equal shares to Amelia Robertson and Mary Elizabeth Tunstall, and that consequently this transmission of Mary's share constituted the final degree in the substitution, so that Amelia Robertson became indefeasible proprietor of one-sixth of the whole Seigniorie. The judgment also decides against

RECORD. the Intervenant two points which had also been raised at the argument in the Superior Court. The Intervenant had urged that assuming substitutions to be limited to three degrees, still when several persons took the property conjointly and concurrently, they should under all circumstances be considered as forming only one degree in the substitution. The learned Judge in one *considérant* of his judgment followed the holding of the Court of Queen's Bench in a previous case to the effect that tacit substitution took place by the decease of any one of the joint beneficiaries in favor of the others and that this constituted a degree in the substitution as to the part so transmitted. The other point urged by Intervenant was that by the laws in force at the time of the making of the will and of the testator's death substitutions were not limited to three degrees, and the learned Judge held against this contention. 10

p. 5,
ll. 15-30. 14. The majority of the Court of Review reversed this judgment, holding that the share of Mary Robertson as substitute did not at her death pass to Amelia Robertson and Mary Elizabeth Tunstall, but that any further substitution of the said share created by the will remained suspended pending the fulfilment of the condition upon which it was by the terms of the said will made dependent, namely, that two of said three persons, Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall, should die without children, which further substitution only took effect upon the fulfilment of said condition by the death without children of Amelia Robertson. 20

15. The judgment consequently holds that no part of the share of Mary Robertson was vested in Amelia Robertson so as to make her absolute owner thereof. Having taken this view of the case, the Court of Review did not by its formal judgment find it necessary to decide the other two points raised by the Intervenant in the Superior Court.

p. 67,
ll. 39-43.
pp. 87,
ll. 4-27. 16. The judgment of the Court of Queen's Bench confirmed the judgment of the Court of Review for the same reasons.

Respondents humbly submit that the judgment of the Court of Queen's Bench was right, and that the said judgment ought to be confirmed and the appeal dismissed for the following among other 30

REASONS :

1. Because by the terms of the will of the late William Plenderleath Christie, the testator did not create a substitution of the share of Mary Robertson in favor of Amelia Robertson and Mary Elizabeth Tunstall, but this portion was substituted to the child or children of the survivor of the three beneficiaries, Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall, in the event of the two predeceasing beneficiaries leaving no children, which condition was fulfilled in this case. 40

2. Because by law when, 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 until the opening to exercise his rights and remain liable for his obligations, and consequently the ownership of Mary's share was not vested upon her death in Amelia Robertson and Mary Elizabeth Tunstall, as absolute owners, but the representatives of Mary Robertson, pending the fulfilment of the condition and until the opening of the substitution, became entitled to exercise Mary's rights subject to the liability of handing over to the ultimate substitute.
- 10
3. Because, assuming that at the time the will was made and the testator died, substitutions were limited to three degrees (or two, exclusive of the institute), the substitution in this case became exhausted only when it opened in favor of Alfred E. Roe, the son of Mary Elizabeth Tunstall; the first degree of the substitution being Katherine Robertson and the second degree comprising Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall
- 20
4. Because, assuming that at the time of the execution of the will and the death of the testator, substitutions were limited to three degrees by the laws in force at that time, the three beneficiaries, Mary Robertson, Amelia Robertson and Mary Elizabeth Tunstall, having taken the property conjointly and concurrently, should be counted but as one degree in the substitution.
5. Because by the laws in force at the time of the execution of the will and of the death of the testator, substitutions in Lower Canada were not limited to three degrees.
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6. Because the Judgment of the Court of Queen's Bench and of the Court of Review, and the reasons given for those judgments are right.

E. LAFLEUR.

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RESPONDENTS' CASE.

BARNES & BERNARD,
11, *Finsbury Circus, E. C.*