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 31st 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.