CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

ARMAND PRÉVOST AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

CHARLES ARTHUR PRÉVOST AND OTHERS (DEFENDANTS) .....

AND

VALMORE LAMARCHE ÈS QUAL. (MIS EN CAUSE) ..... } RESPONDENT.

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*Oct. 31.
*Nov. 15.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Construction of will — Usufruct — Substitution — Partition between institutes—Validating legislation—60 V. c. 95 (Q.)—Construction of statute—Restraint of alienation—Interest of substitutes —Devise of property held by institute under partition—Devolution of corpus of estate en nature—Accretion—Res judicata—Arts. 868, 948 *C.C.*

The effect of the statute, 60 Vict. ch. 95 (Que.), respecting the will of the late Amable Prévost, read in conjunction with the provisions of the will and codicils therein referred to, is to declare the deed of partition between the beneficiaries thereunder final

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*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington, Maclennan and Duff JJ.

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and definitive and not merely provisional; the judgment of the Court of Queen's Bench, on the appeal side taken under that statute, has no other effect. Neither the statute nor the judgment referred to sanctions the view that the said will and codicils constitute more than one substitution; there was but one substitution created thereunder in favour of all the joint legatees and consequently accretion takes place among them within the meaning of article 868 of the Civil Code, in the event of any legacy lapsing, under the terms of the will, upon the death of an institute without issue prior to the opening of the substitution. In such case, the share of the institute dying without issue devolves to the other joint legatees, as well in usufruct as in absolute ownership, and, consequently, none of the institutes or substitutes have the right of disposing of any portion of the testator's estate, by will or otherwise, prior to the date of the opening of the substitution.

Judgment appealed from (Q.R. 28 S.C. 257) reversed. *DeHertel* v. *Goddard* (66 L.J.P.C. 90) distinguished.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal (1), Loranger J. dissenting, whereby the judgment of the Superior Court, District of Montreal (Fortin J.), dismissing the plaintiffs' action with costs was affirmed.

The action was brought by the appellants, Armand Prévost and Adèle Prévost (wife of Azarie Brodeur) as co-heirs and beneficiaries under the will of the late Amable Prévost, deceased, against all other co-heirs, under the said will, and the respondent, Lamarche, in his capacity of testamentary executor of the last will of Louis Roméo Prévost (one of the co-heirs) deceased, for the partition of the share of the estate of the said Louis Roméo Prévost under the last will of the said late Amable Prévost. The defendants, other than the present respondent, did not contest the action, and the judgment appealed from was rendered upon the issues joined by the executor, under the circumstances following.

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The late Amable Prévost, who died in 1872 leaving seven sons and daughters, made his last will on 26th December, 1844, and subsequently made codicils thereto, the material parts of which are as follows:— By his last will he gave and bequeathed to the child born and to the children to be born of his marriage with his wife (yet living) the enjoyment and usufruct during their lives of all the property, movable and immovable, of which he should die possessed, his said child and children to be born to enjoy said property in usufruct during their lives, subject to all the charges ordinarily imposed upon usufructuaries, the full ownership of his said property to belong, after the death of his said children or any of them to the children to be born of their respective marriages, and his grandchildren who were thereby substituted to his said children, as regards his said property, to enjoy, use, deal with, and dispose of the same as they may think fit, appointing them for that purpose his universal legatees.

It further provided that the revenues of said property should be received by the testator's children for their support and that of their children, and should, therefore, be neither transferable nor subject to seizure by creditors; that the property itself should pass to the grandchildren, and should not be sold even for their greater advantage; and that none of the grandchildren should alienate, incumber, or hypothecate their parts or rights or his or her part and rights in his said property before the extinction of the usufruct in such property bequeathed to his said children, or of the share thereof belonging to the father or to the mother of said grandchildren respectively.

One of the codicils contained the following provi-

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sions: "It is my will that if the child born or the children to be born of my marriage with * * * my wife, all die before her without leaving children or legitimate descendants, * * * my said wife shall have, during widowhood, the enjoyment and usufruct of all the property movable and immovable * * * except the land with buildings and dependencies which I have at Terrebonne, which I leave, in such case, to Louis Joseph Prévost, my brother, in full ownership, and as to my other property movable and immovable after the extinction of the usufruct thereof, which I have bequeathed to my said wife during widowhood, they shall return and belong to the said Louis Joseph Prévost and to Dame Edwidge Prévost, wife of Mr. Séraphin Bouc and Miss Anathelie Prévost, my sisters, if they are living, if not to their children," etc.

It was contended by the appellants that the said will and codicil should properly be interpreted as imposing on each of the testator's children an express substitution in favour of their children if any, and, in case of death without issue, an implied substitution in favour of the institute's surviving brothers and sisters or their children. The interpretation contended for by the respondent was that the will created as many substitutions as there were children of the testator; that each substitution was in favour of the children of the institute if any, and, failing children, in favour of the brother and sisters of the testator in the event of all the testator's children dying without issue before their mother; that upon the death of Louis Roméo Prévost (who died without issue, in the State of California, on the 19th of October, 1902), his share was subject only to the contingent substitution in favour of his uncle and aunts and in the meantime remained in his estate.

After having held possession of the estate of the late Amable Prévost, as usufructuaries in common, for about seven years after his death, the beneficiaries executed a deed of partition thereof among themselves by which the said estate was divided into seven separate shares and, since then, the said shares have been separately held and enjoyed by the respective beneficiaries to whom they were so allotted. Doubts having arisen as to the validity of the partition, upon petition of all the beneficiaries having interests on the 9th of January, 1897, a special statute(1) was enacted, as follows, by the Legislature of the Province of Quebec:

"An Act to declare the Partition of the Property of the Estate of the late Amable Prévost final and definite."

"Whereas by his testament, dated the twenty-fourth of December, one thousand eight hundred and forty-four, and by codicils, respectively dated the twenty-sixth day of December, one thousand eight hundred and forty-four, and the twenty-second day of January, one thousand eight hundred and sixty, received at Montreal before J. Belle and his colleague, notaries, the late Amable Prévost, in his lifetime of the same place, merchant, bequeathed to the children born and to be born of his marriage with Dame Rosalie Victoire Bernard, his wife, the usufruct and enjoyment, during their lifetime, of all his movable and immovable property, the full ownership of the said property to belong, after the death of the said children or of any of them, to the children to be born of their respective marriages;

"Whereas the said will and codicils constitute a substitution in which the children of the said late

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Amable Prévost are the institutes and his grand-children are the substitutes; and whereas it is especially ordered by the said will and codicils that the real estate or immovables of the testator should pass in kind into the hands of the said grand-children without the children of the testator or even the grand-children, so long as the usufruct bequeathed to the children should exist, being able to alienate, sell, pledge or hypothecate the same for any cause whatsoever;

"Whereas the said late Amable Prevost died at Montreal on the ninth of February, one thousand eight hundred and seventy-two, without having revoked his said will and codicils, leaving as his survivors his wife, the said Dame Rosalie Victoire Bernard, and seven children;

"Whereas the said late Amable Prévost was common as to property with his said wife, Dame Rosalie Victoire Bernard, so that the said will affected only the share of the said late Amable Prévost in the said community and the property personally belonging to him;

"Whereas, after inventory was made of the property that was left by the said late Amable Prévost, his said children and their mother, the said Dame Rosalie Victoire Bernard, proceeded on the twenty-seventh of April, one thousand eight hundred and eighty-three, by deed passed before G. M. Prévost, notary, to the partition and liquidation of the said community of property and of the estate of the said late Amable Prévost; and, by the said partition, all the movable and immovable properties coming to them from their father were divided amongst the seven children of the said late Amable Prévost, his only heirs and legal representatives;

"Whereas the agreements and stipulations of the said partition have been carried out on both sides, and since the said day, the twenty-seventh of April, one thousand eight hundred and eighty-three, the heirs Prévost have separately enjoyed the property of the said estate according to the partition then made amongst them;

"Whereas, since the said partition, doubts have arisen as to the question whether the said partition was a provisional one, like that between institutes, under the provisions of article 948 of the Civil Code, or whether, on the contrary, it is final, in consequence of the special provisions contained in the will of the said late Amable Prévost;

"Whereas, the said institutes have consulted eminent legal authorities, but their opinions are divided on this point and even, in a non-litigious proceeding, to wit: an application made by Dame Marie Elizabeth Adèle Prévost, wife of Azaire Brodeur, Esquire, physician, of the City of Montreal, for the purpose of being authorized to expend a sum of money for the improvement of a property which devolved to her by the said partition, the Honourable Mr. Justice Jetté, by an order in chambers, dated the twenty-seventh of March, one thousand eight hundred and ninety-six, ordering the convening of a family council, declared that the said partition was not provisional, but final, that the said legatees, the institutes, were authorized to make it so by the very terms of the said will and codicils, and, consequently, that each institute definitely owned the share of the property bequeathed to him, on the sole condition of delivering it to his children, and that the other institutes have no interest in the property so allotted to one of them;

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"Whereas the said order, although it cannot constitute *res judicata,* causes serious doubts as to the nature, whether provisional or final, of the said partition; whereas such doubts cannot be solved except by a suit at law between the said heirs Prévost, which cannot but be very long and costly, and which would have the effect of dissipating the property of the said succession; whereas the legatees, the institutes, have divided the property of the said estate amongst themselves in a fair and equitable manner; whereas one of them, to wit: Amable Oscar Alexandre Prévost, in his lifetime of the City of Quebec, superintendent of the Government Cartridge Factory at Quebec, died on the sixteenth of September, one thousand eight hundred and ninety-five, leaving minor children, now represented by their mother, Dame Marie Louise Duchesnay, their tutrix, duly appointed in law, in favour of whom the said substitution is now opened, as regards their father's share, so that it is necessary to determine, without delay, the true character of the partition made on the twenty-seventh of April, one thousand eight hundred and eighty-three, of the property left by the said late Amable Prévost;

"Whereas all the testamentary executors appointed by the said late Amable Prévost are now deceased, and the interested parties have applied to the courts to have them replaced, but the Honourable Mr. Justice Taschereau, by an order, dated fifteenth of November, one thousand eight hundred and ninety-six, declared that the execution of the said will and codicil were completed, and that there was no occasion to replace the said testamentary executors;

"Whereas, Edouard Henri Armand Prévost, burgess, both in his quality of legatee and institute, and

as curator duly appointed in law to the said substitution, Louis Roméo Prévost, accountant, Toussaint Prévost, Benjamin Hector Prévost, broker, and Dame Marie Rhéa Berthe Prévost, widow of the late Joseph Elzéar Berthelot, all of the City of Montreal, being the majority of the legatees and institutes in the substitution established by the said late Amable Prévost, have, after alleging the facts above mentioned, represented, by their petition, that they are prepared to accept the principle laid down in the order of Mr. Justice Jetté, as aforesaid, and to acknowledge the partition of the property of the estate of the said late Amable Prévost, as having been final and definite; and whereas it is very important, in order to remove all doubts and avoid ruinous law suits for the heirs, that the said partition of the twenty-seventh of April, one thousand eight hundred and eighty-three, of the property of the estate of the said late Amable Prévost, be declared final and definite to all intents and purposes whatsoever; and whereas it is expedient to grant the prayer of the petitioners;

"Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

"The partition of the property of the estate of the late Amable Prévost, in his lifetime merchant, of the City of Montreal, made by and between the legatees who are institutes in the substitution under the will and codicils of the latter, dated respectively the twenty-fourth and twenty-sixth of December, one thousand eight hundred and forty-four, and the twenty-second of January, one thousand eight hundred and sixty, before J. Belle and his colleague, notaries, by a deed of partition and liquidation before G.

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M. Prévost, notary, on the twenty-seventh of April, one thousand eight hundred and eighty-three, is declared to be and always to have been final and definitive; and, accordingly, the legatees who are institutes in the substitution established by the said late Amable Prévost are declared to be and always to have been the sole proprietors of the share of the said property which has respectively devolved to them, under the terms of the said deed of partition and liquidation, subject to the condition of handing over such share to their children at their death, as set forth in the said will and codicils; and the children, issue of the marriage of the said late Amable Oscar Alexandre Prévost with the said Dame Marie Louise Duchesnay, are declared to be and always to have been, since the death of their father, the sole owners of the property which devolved to the said late Amable Oscar Alexandre Prévost, in virtue of the said partition.

"Nevertheless any of the parties interested may, within two months following the passing of this Act, submit to the Court of Queen's Bench, sitting in appeal, the other heirs being duly notified, the question whether the said partition of the 27th April, 1883, made before Prévost, notary, is final and definitive, which may be done by taking an appeal to the said court by inscription in the ordinary way from the judgment rendered in chambers by the Honourable Mr. Justice Jetté, in March, 1896, and in such case the parties shall proceed as in a case in which the said partition shall have been declared definitive.

"If, by the judgment of the said court, the said partition is declared definitive, the said judgment shall be declared final and without appeal. If the contrary, the said parties shall immediately proceed to a

new partition and liquidation according to the ordinary rules of voluntary partitions, each interested party returning to the mass, according to law, all that he shall have received under the said partition of the 27th April, 1883. The partition thus made after the returns shall be final and definitive for all purposes, subject to the substitution enacted by the will of the late Amable Prévost."

On the 23rd of December, 1897, the Court of King's Bench, upon an appeal taken under said Act and to which Louis Roméo Prévost and the present parties, were parties, affirmed the judgment of Mr. Justice Jetté in the Superior Court and held that the testator had "bequeathed to each of his children an equal share of his property, and substituted to each of his children the children of the latter, to receive the share of the property which their father or mother would have received by means of the legacy to the latter; that the share of the property accruing to each of his said children had been fixed at the time of the testator's death and defined by the said partition for each of the children, within the language and according to the intention of said will'; and declared the partition final.

On the 19th of October, 1902, Louis Roméo Prévost made his last will in authentic form, thereby bequeathing to Marie Louise Bouthillier, during her natural life should she remain unmarried, an annuity of $1,200 per annum, to be paid out of his estate, consisting principally of the share he inherited under his father's will, and the residue to his brothers, Oscar Prévost, Arthur Prévost, Armand Prévost and Hector Prévost, and his sister, Mrs. Berthelot, or the survivors or survivor of them and to the lawful issue of

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any of them who might pre-decease him, in equal shares, constituting them his universal residuary legatees in absolute ownership. In his said will he also appointed the respondent his sole executor, extending his powers beyond the time limited by law and authorizing him to sell or dispose of all or any part of his said estate with the powers necessary to carry out that provision.

In the Superior Court, the appellants' action was dismissed with costs by Mr. Justice Fortin, who held that the effect of the will, codicils and the statute, read together, was the constitution of as many separate and distinct substitutions as there were children of the testator, and his judgment was affirmed by the judgment of the Court of Review(1), now appealed from.

The main questions upon the present appeal are as to the correct interpretation of the will of the late Amable Prévost and codicils thereto read in connection with the statute, 60 Vict. ch. 95 (Que.); the effect of the partition, and the right of the late Louis Roméo Prévost, dying without issue, to dispose of his share in the estate of the said late Amable Prévost as he did by his will.

Brosseau K.C. for the appellants. The will and the codicils do not provide for a partition and the whole estate is bequeathed in usufruct to the children and the property to the grandchildren *en bloc,* without assigning any shares to the children or grandchildren. The usufruct is declared inalienable and unseizable and the will expressly forbids alienation of the property until the end of the usufruct. The property must be delivered to the grandchildren *en nature*

(1) Q.R. 28 S.C. 257.

as at the time of the testator's death. The grand-children are the real legatees of the estate according to the testator's will. Roméo Prévost could not make a will and dispose of part of the estate which was given in express terms in usufruct to the children, without assigning any share, and in property to the grand-children of the testator. The testator's intention to preserve the whole estate for the grand-children is moreover expressly manifested in the codicil where it is provided that if all the children die without issue, the estate shall revert in usufruct to the widow and in property to the brother and sisters. Here again it is quite clear that the testator wished the estate to remain in the family, and that, in the case of only one grand-child surviving he should get the whole.

According to respondent's contentions, if of the seven children only one had married and had issue, that issue would have received only one-seventh of the estate; and six-sevenths would go to strangers, if the children chose to make wills to that effect. Such cannot be the proper interpretation of the will of the late Amable Prévost.

The statute had not the effect of changing the will as to the transmission of the estate. The only matter that it settles is the partition of the property and not the transmission, which will follow according to the will. The words of the first paragraph are: "And, accordingly, the legatees who are institutes in the substitution established by the said late Amable Prévost are declared to be and always to have been the sole proprietors of the share of the said property which has respectively devolved to them, under the terms of the said deed of partition and liquidation, subject to the condition of *handing over such share to their*

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children at their death, as set forth in the said will and codicils." The will provides that the property in the estate shall belong to his grand-children without assigning any particular share to any one of them. This general disposition of the estate makes it clear that the intention was that it should contain the clause of accretion. Roméo Prévost having died without issue, his shares accrued to his co-usufructuaries and to the grand-children.

The judgment of the Superior Court is based on the case of *DeHertel* v. *Goddard*(1), which was rendered by Loranger J., who states, in the present case, that there is no analogy between the two cases.

In the case of *Adèle Prévost* v. *Berthe Prévost*(2), on a motion to dismiss the appeal on the ground that Adèle Prévost, one of the appellants in this case, had no interest in her co-heir's share, because the partition had been declared final and definitive, the Court of King's Bench dismissed the motion and maintained the contentions of appellants herein on that point.

We also refer to 7 Aubry & Rau, nn. 714, 726 and 22 Demolombe, p. 349, no. 394.

Béique K.C. for the respondent. The statute and judgment of the Court of King's Bench are absolutely decisive. It is quite clear that the legislature intended to set at rest every question upon which judge Jetté had expressed an opinion. The summary of his opinion is given in the preamble;—the necessity of removing doubts and preventing litigation, the declaration, in the petition, that the petitioners were willing to accept judge Jetté's opinion, the granting of the

(1) Q.R. 8 S.C. 72; 66 L.J.P.C. 90.

(2) Q.R. 14 K.B. 309.

petition; and the safeguarding of the rights of the other heirs by means of an appeal from judge Jetté's order, put this beyond doubt. One of the questions upon which judge Jetté expressed an opinion, was the one in controversy here, viz., Whether or not any substitute had, after the partition, any interest in the property assigned by the partition to the other institutes. This question was answered in the negative, and the Court of King's Bench agreed with him. There is, therefore, *res judicata* on the point. The statute declares the partition to be and always to have been final and definitive; and accordingly the institutes to be and to always have been the sole proprietors of the property, respectively devolving to them under the deed of partition, subject to the condition of handing over such share to their children, etc. Here, as in the judgment of Mr. Justice Jetté, is found not merely a holding that the partition is final, but a declaration as to the consequences of such finality, that each of the institutes is and always has been proprietor but that his ownership was subject to the condition of handing over, etc. It is evident, both grammatically, and from the intention evinced by the recitals in the preamble that "the conditions" mean "the sole condition." The mere use of the definite article in connection with the word "condition" excludes the idea that there any other condition was contemplated.

The intention of the Act was that, as between the institutes, there should be but one final and definitive partition; either the one already affected, or the new one ordered by the Act in the event of the Court of Queen's Bench declaring it to have been provisional. The partition having been declared final, each co-petitioner must be "deemed to have inherited alone and

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directly all the things comprised in his share * * * and to have never had the ownership of the other property of the succession." Art. 746 C.C. Everything, therefore, is in the same position as if the will had specifically bequeathed to Roméo Prévost the property which actually fell to him under the partition, with a substitution in favour of his children.

Consider the position of the children of the deceased institute, Amable Oscar Alexandre Prévost. The partition having been final, they must be "deemed * * * to have never had the ownership of the other property of the succession"; they must be deemed to have been excluded from the ownership of the other property of the succession. Yet if appellants' contention be well founded, they are entitled to a part of this other property, and perhaps ultimately to the whole of it.

The case is concluded by the judgment of the Privy Council in *De Hertel* v. *Goddard*(1). Reference is also made to *Dumont* v. *Dumont*(2); *Joseph* v. *Castonguay*(3); Thevenot-Dessaules (ed. Mathieu) nos. 1003, 1004, 1005, 1006; 4 Mignault, Code Civil, 332.

The judgment of the court was delivered by

GIROUARD J.—Je partage entièrement le sentiment de Mr. le juge Loranger, qui a différé de la majorité de la cour de revision. Les motifs qu'il apporte à l'appui de son dissentiment me semblent si péremptoires que je serais disposé à les adopter purement et simplement. Mais comme la cause est importante, nous croyons devoir résumer les raisons qui nous ont

(1) Q.R. 8 S.C. 72; 66 L.J.P.C. 90.

(2) 7 L.C. Jur. 12.

(3) 3 L.C. Jur. 141.

engagés à arriver à cette conclusion, sans cependant récapituler tous les faits de la cause.

En cour supérieure, Mr. le juge Fortin admet que le testateur, Amable Prévost, a fait deux substitutions distinctes, l'une en faveur de ses enfans commé grevés, et de ses petits enfants comme appelés, et l'autre subsidiaire, si tous ses enfants décèdent sans postérité, en faveur de sa femme comme grevée et de certains collatéraux comme appelés. Mais, ajoute le savant juge, ceci a été changé en 1897 par un acte de la législature de Québec, 60 Vict. ch. 95, intitulé

Loi déclarant final et définitif le partage des biens de la succession de feu Amable Prévost.

La législature de Québec a si souvent modifié les testaments de ses habitants, que depuis longtemps on tient pour constant qu'il n'y a pas de testament qui soit à l'abri de ses coups. A cette même session de 1897, pas moins de huit testaments ont été revus, corrigés et surtout considérablement altérés. Si les substitutions sont préjudiciables aux familles et à la société, il vaut mieux les abolir, comme on a fait en certains pays, plutôt que de les laisser à la merci de la législature à la requête de certains usufruitiers qui trouvent toujours leurs revenus insuffisants pour supporter le fardeau de la vie moderne.

Mr. le juge Fortin et la majorité des juges en révision, sont d'avis que l'effect de la loi Prévost a été de créer autant de substitutions que le testateur a laissé d'enfants, chaque part formant une substitution distincte.

Mr. le juge Pagnuelo est d'avis que la portée du jugement de Mr. le juge Jetté, qui fait l'objet de la loi Prévost, est que

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chaque grevé possède définitivement la part de biens à lui léguée, sous la seule charge de la rendre à ses enfants, et que les autres grevés n'ont aucun intérêt dans les biens ainsi attribués à l'un d'eux.

Le préambule de l'acte fait en effet mention de ce jugement dans ces termes. Il ajoute même que les grevés

sont prêts à accepter le principe formulé dans l'ordonnance du juge Jetté, tel que susdit.

Mais quel est ce principe et ce jugement qui l'a consacré? Etait-ce le principe invoqué aujourd'hui par l'intimé, qui n'était pas même en jeu? On ne peut pas supposer que le jugement porte au delà de ce qui était demandé, qu'il soit *ultra petita*. Que demandaient les grevés devant Mr. le juge Jetté et la législature? Simplement une déclaration que le partage qui avait été fait était non pas provisoire, mais définitif. Et c'est tout ce qui fut fait. Les parties comme le juge n'ont jamais voulu pourvoir à un cas qui n'existait pas, à l'époque du partage, ni à celle du jugement ou même celle de l'acte de la législature, savoir, celui où un ou plusieurs grevés—ils étaient au nombre de sept —décéderaient sans enfants. En exprimant son opinion sur l'effet du partage, Mr. le juge Jetté n'a considéré et ne pouvait considérer que les circonstances qu'il avait devant lui, savoir, que tous les grevés vivaient ou étaient representés par leurs enfants. C'était l'effet immédiat du partage que le savant juge avait en vue. Il eut été plus prudent de s'en tenir aux conclusions de la requête des grevés et de déclarer seulement que le partage était définitif. Peut-on supposer un seul instant que les grevés auraient accepté un effet de ce partage qui leur enlevait à eux et à leurs enfants, le droit d'accroissement, si l'un d'eux décédait sans enfants avant l'ouverture de la substitution? Ils

ont accepté le principe du jugement qui décrétait que la partage était définitif et non provisoire, voilà tout; et c'est ce qu'ils s'empressent de déclarer de suite comme la phrase complète le démontre, savoir:

qu'ils sont prêts à accepter le principe formulé dans l'ordonnance du juge Jetté, tel que susdit, et à reconnaître le partage des biens de la succession du dit feu Amable Prévost comme ayant été final et définitif.

Si le jugement de Mr. le juge Jetté laisse quelque doute sur la portée qu'il peut avoir sur le testament de Mr. Amable Prévost, celui de la cour d'appeal n'en souffre aucun. Cette dernière cour était autorisée à l'examiner et même à le casser par le statut que nous venons d'indiquer, 60 Vict. ch. 95. Le grevé Roméo Prévost était lui-même un des requiérants provoquant cette révision. La cour d'appel a-t-elle sanctionné l'-opinion du juge Jetté que les grevés n'ont aucun intérêt dans les biens attribués à l'un d'eux par le partage? Non, elle a purement et simplement déclaré le partage final et définitif. Comme la teneur de cet arrêt a jusqu'ici échappé à l'attention des juges et des avocats, il n'est pas sans à propos d'en rappeler le texte:

Considérant que le dit testateur a légué à chacun de ses enfants, une part égale dans ses biens, et substitué à chacun de ses dits enfants, les enfants de ces derniers, pour recevoir la part des biens que leur père ou leur mère aurait recueillie au moyen du legs fait à ces derniers, et, qu'en autant, la somme des biens, échue à chacun des dits enfants, a été fixée, lors de la date du décès du dit testateur, et définie par le dit partage, pour chacun des dits enfants, aux termes et suivant l'intention du dit testament;

Déclare et adjuge que le dit partage est définitif, et qu'il est par les présentes, décidé qu'il est définitif.

L'acte 60 Vict. ch. 95, décrète enfin que ce jugement sera final et sans appel.

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Il faudrait un texte bien clair pour accepter un changement aussi radical que celui suggéré par l'intimé, et en cas de doute je le donnerai en faveur du testament. Le statut en question ne dit pas cela ni expressément, ni implicitement. Je suis heureux de le constater, la loi Prévost respecte l'invioliabilité des dernières volontés du père de famille qui dispose de sa succession. Le législateur le déclare d'une façon non équivoque et dans le préambule et dans le texte du statut; il légalise tout simplement un partage définitif, qui dans les circonstances était un avantage pour tous les intéressés, sans changer les dispositions testamentaires ou pour être plus précis sans modifier l'ordre de transmission de la substitution qu'il avait créée. L'acte 60 Vict. ch. 95 déclare dans son préambule que Mr. Prévost n'a fait qu'une substitution en faveur de ses enfants et petits enfants (et non pas sept) :

> Attendu que les dits testament et codicilles comportent une substitution dont les enfants du dit feu Amable Prévost sont les grevés et ses petits-enfants les appelés, et qu'il fut spécialement ordonné par les dits testament et codicilles que les biens fonds ou immeubles du testateur passeraient en nature aux dits petits-enfants, sans que les enfants du testateur, ni même les petits-enfants, tant que l'usufruit légué aux enfants ne serait pas éteint, puissent les aliéner, vendre, engager ou hypothéquer pour quelque cause que ce fût.

Puis dans le dispositif, section 1ère, le statut décrète que

> le partage des biens de la succession de feu Amable Prévost * * * fait par et entre les légataires grevés de substitution * * * est declare etre et avoir toujours ete final et définitif, et en conséquence les légataires grevés de substitution du dit feu Amable Prevost sont déclarés être et avoir toujours été les seuls propriétaires de la part des dits biens qui leur est respectivement échue aux termes du dit acte de partage et liquidation, sous la charge de rendre cette part à leurs enfants, à leur décès, tel que porté aux dits testament et codicilles.

Mais si l'un des grevés meurt sans enfants, à qui ira sa part? Le statut n'en dit rien expressément. Peut-il en disposer par testament ou autrement? L'intimé prétend que ni le code, ni le testament, n'a prévu cette éventualité, et qu'il n'y a pas lieu à l'accroissement. Le testateur ne parle pas d'accroissement en termes formels. Mais le testament de Mr. Prévost, en créant une seule substitution en faveur de ses enfants et petits-enfants conjointement, qu'il institue ses légataires universels, ne dispose-t-il pas de cette part en faveur des colégataires survivants? C'est ce que veulent dire les termes du testament, la loi des substitutions et le statut, 60 Vict. ch. 95, particulièrement ces expressions qui se trouvent dans ce dernier document que les grevés de substitution seront tenus *de rendre* à leurs enfants, "tel que porté aux dits testament et codicilles," ou encore celles qui forment les dernières lignes du statut,

à la charge de la substitution créée par le testament de feu Amable Prevost.

Assurément lorsqu'un chef de famille déclare que l'usufruit de ses biens appartiendra à ses enfants et la propriété à ses petits-enfants, il n'entend pas que ce legs change de destination chaque fois qu'un enfant ou petit-fils, représentant une souche, décédera sans postérité avant l'ouverture de la substitution. Le legs reste toujours le même et de même effet, c'est-à-dire, qu'il sera toujours en faveur des enfants et petits-enfants quelque soit leur nombre. Par la force même du legs, il y a accroissement, même si l'article 868 du Code Civil n'existait pas. Cet article, à mon avis, n'est venu que confirmer la position des légataires faite au testament. Il déclare en effet:

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Il y a lieu à accroissement au profit des légataires en cas de caducité lorsque le legs est fait à plusieurs conjointement.

Il est réputé tel lorsqu'il est fait par une seule et même disposition et que le testateur n'a pas asaigné la part de chacun des co-légataires dans la chose léguée. L'indication de quote-part égale dans le partage de la chose donnée par disposition conjointe n'empêche pas l'accroissement.

On dit qu'ici le legs n'est pas caduc dans le sens de cet article. Pour quelle raison? C'est ce que je ne puis comprendre, à moins de décider que le testateur a fait autant de substitutions qu'il y a de grevés, proposition que nous ne pouvons accepter. Il n'a créé, selon nous, qu'une seule substitution en faveur de plusieurs conjointment, par une seule et même disposition, comme d'ailleurs le déclare la loi de 1897, et alors il y a accroissement.

Je ne puis concevoir qu'un legs fait aux enfants en usufruit, et à leurs petits enfants en propriété, ne devient pas caduc à l'égard du grevé, et de son appelé, et ce pour leur part, lorsqu'ils meurent sans enfants avant l'ouverture de la substitution. Caduc, du latin *cadere*, veut dire que le legs, d'ailleurs valide, tombe et demeure sans effet par le décès du grevé sans enfants avant l'ouverture de la substitution. Sa part accroit aux autres légataires conjoints, tant en usufruit qu'en propriété. C'est la volonté expresse du testateur qui l'exige. Personne autre n'est appelé. C'est la situation que l'art. 868 C.C. a en vue.

Enfin, lorsque l'on examine les diverses clauses du testament, l'on acquiert la ferme conviction que ce que le testateur voulait c'était avant tout de conserver dans sa famille, jusqu'à la deuxième génération après lui, la fortune opulente pour l'époque qu'il avait amassée. Les legs d'immeubles sont déclarés insaisissables et incessibles. Défense absolue de les aliéner est faite aux légataires en usufruit. Les appelés eux

mêmes, c'est-à-dire, les petits-enfants, ne peuvent pas non plus disposer de leur part ou de leurs droits durant la vie de leurs parents et des autres grevés. Je veux, dit-il

que mes biens fonds ou immeubles de quelques nature et qualité qu'ils soient passent en nature à mes dits petits-enfants et qu'en conséquence ils ne puissent être en tout ou en partie vendus ou aliénés par quelque autorité que ce soit ni sous quelque prétexte que ce puisse être même sous celui de plus grand avantage de mes dits petits-enfants, car telle est mon expresse volonté à cet égard.

Que signifie encore la deuxième substitution en faveur des collatéraux qu'il nomme, si ses enfants meurent tous sans enfants? Aucune allusion n'est faite à cette substitution subsidiaire dans le statut de 1897. Il ne paraît pas que les intéressés à cette disposition aient été mis en cause ou appelés, probablement parce qu'en face du nombre des descendants de Mr. Prévost, on la considérait comme non avenue. Ses enfants existaient tous ou presque tous en 1860, quelques années avant sa mort, lorsqu'il fit son dernier codicille et il n'a pas songé alors à révoquer cette seconde substitution, sans doute pour mieux manifester sa volonté de conserver sa fortune dans sa famille.

Comment cette deuxième substitution serait-elle réalisable, si les biens étaient passés légalement à des mains étrangères? Tous les grevés auraient bien pu faire comme leur frère Roméo et aliéner ainsi toute la succession. Toutes ces dispositions démontrent l'absurdité des prétentions de l'intimé.

Il ne me reste plus qu'ajouter quelques mots à propos de l'arrêt du conseil privé dans la cause de *De Hertel* v. *Goddard*(1), 1896, qui semble avoir in-

(1) 66 L.J.P.C. 90.

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fluencé quelques juges des tribunaux inférieurs. J'ai lu et relu cette décision et je dois avouer que la rapport qui en est fait est si raccourci—j'allais dire vague, il couvre deux pages—que je n'ai pu à sa lecture en saisir toute la portée. Comme dans cette cause, le conseil privé a confirmé le jugement de la cour de révision et celui de la cour d'appel, je suis allé chercher des renseignements dans les rapports de ces cours. Le jugement de la cour d'appel ne me parait pas avoir été rapporté, mais celui de la cour de révision l'est (1). Il couvre treize pages et ça n'a pas été sans un certain travail que j'ai pu comparer les deux espèces. Briévement, voici ce dont il s'agissait dans la cause de *De Hertel* v. *Goddard* (2). William P. Christie lègue la seigneurie de Léry en usufruit à Catherine Robertson, et à son décès à ses deux filles, Mary et Amelia Robertson, et à sa nièce, Elizabeth Tunstall, qu'il institue d'ailleurs ses légataires universelles en usufruit, pour en jouir par parts égales, aussi en usufruit leur vie durante et, apres leur décès, à leurs enfants en propriété; enfin, au cas du décès de deux d'entr'elles, sans enfants, la seigneurie descendait en propriété aux enfants de la survivante. Cette dernière éventualité arriva. La nièce mourut la dernière laissant un fils. Le conseil privé, la cour d'appel, et la cour de révision ont jugé que la propriété était dévolue à ce fils, à l'exclusion de la légataire universelle d'Amelia. Je ne puis conçevoir comment cet arrêt peut être de quelque secours à l'intimé. Je crois qu'il aide plus les appelants, car il maintient le principe de l'accroissement entre les grevés au deuxième dégré; il ne pouvait en être question quant aux appelés, puisqu'il n'y en avait qu'un seul. Ce qui est

(1) Q.R. 8 S.C. 72.

(2) 66 L.J.P.C. 90.

certain, c'est que les deux espèces sont bien différentes. D'abord la succession Christie a été ouverte et l'une des grevés est décédée avant le code civil. La succession de Mr. Prévost a été ouverte après. C'est peut-être pour cette raison—il n'en donne pas—que le conseil privé tient que

the word "conjointly" cannot neutralize or control the plain meaning of the words "in equal shares" by which it is immediately followed.

C'est la règle toute contraire que l'article 868 du code consacre. Quoiqu'il en soit, les deux dispositions ne sont pas les mêmes. Le fils d'Elizabeth Tunstall n'a pas recueilli les biens légués par une seule et même disposition conjointe, tandis que les appelés Prévost doivent recueillir non seulement à ce titre, mais encore comme légataires universels. On ne trouve pas dans le testament Christie les prohibitions d'aliéner qui frappent dans le testament Prévost, ni les mêmes liens de parenté. Toutes ces circonstances tendent à faire connaître la volonté du testateur. Enfin, le testament Christie présentait une difficulté touchant la validité du legs à l'appelé, parce que, disait-on, il comprenait plus de dégrés que la loi ne le permettait, et cette difficulté en a soulevé une autre au sujet de l'interprétation de l'article 963 du code, qui ne se présente pas dans le testament Prévost. Sans entrer dans plus de détails, je conclus, avec Mr. le juge Loranger, qui a rendu la jugement de la cour de révision dans la cause de *De Hertel* v. *Goddard*(1), que les deux espèces n'ont guère d'analogie.

Pour ces raisons, nous sommes d'avis d'accorder l'appel et les conclusions de la demande des appelants,

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avec dépens contre le mis-en-cause, contestant et intimé devant toutes les cours, encourus depuis sa défense à l'action.

Appeal allowed with costs.

Solicitors for the appellants: *Brosseau & Holt.*

Solicitor for the respondent: *A. Lamarche.*