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*Mar. 6, 10.

*May 5.

JOSEPH JACQUES ARTHUR PLACIDE REMILLARD *et al.* (PLAINTIFFS) ..... } APPELLANTS;

AND

MARCEL HUBERT CHABOT *et al.* (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Construction of will — Opening of substitution — Legacy to substitutes— Legatees taking per stirpes or per capita.

By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, during her lifetime and, after her death, to his surviving children and, by the sixth clause, provided as follows:

Quant à la propriété de mes dits biens meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et lègue aux enfants légitimes de mes enfants, qui seront mes petits-enfants; pour, par, mes dits petits-enfants, jouir, faire et disposer de mes dits biens en pleine propriété et par égales parts et portions entre eux, à compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituant mes légataires universels en propriété.

Held, reversing the judgment appealed from, that all the grandchildren participated in the legacy and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substitution created by the will, for such portion of his estate, should be divided among all the grandchildren then living in equal shares, the grandchildren taking *per capita* and not *per stirpes.*

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and dismissing the plaintiffs' action with costs.

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*PRESENT:—Sedgewick, Girouard, Davies, Mills and Armour JJ.

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The action was taken by one of the grandchildren of the deceased testator for a declaration that the will created a substitution which opened at the death of each of the institutes (his children), for the portion of the estate representing the one-fifth of the revenues bequeathed to such institutes and that the partition should be made, under the clauses of the will recited in the judgments now reported, among all the grandchildren *per capita* and not *per stirpes*. The defence was that the division among the grandchildren should be made *per stirpes*, the children of each institute being called into the substitution for the share of which the revenue had been bequeathed to their respective parents to be equally divided between them and not among the whole of the grandchildren *per capita*. In the Superior Court, Cimon J. decided that the will created a substitution and that the children of the five institutes were entitled to receive *per capita* the share of each of the institutes. The present appeal is from the judgment of the Court of King's Bench which reversed the decision of the trial judge, Bossé and Würtéle JJ. dissenting, and decided ; 1. That the will created a substitution ; and 2. That the children of each institute were alone entitled to receive *per stirpes* the portion of their parent.

Stuart K.C. and *Dorion* for the appellants.

Belleau K.C. and *Malouin K.C.* for the respondents.

SEDGEWICK J.—I concur in the judgment dismissing the motions to quash and to add parties as appellants and also dismissing the appeal and restoring the judgment of the Superior Court with costs in all the courts for the reasons stated by my brother Girouard.

GIROUARD J.—Il s'agit d'une substitution et du partage d'une succession testamentaire valant une cinquantaine de mille piastres.

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L'intimé fait d'abord motion pour renvoi de l'appel alléguant que l'intérêt de l'appelant n'allait pas jusqu'à $2,000. Ce que voyant un autre héritier et mis en cause, qui jusqu'ici n'avait pris a ucune part au litige, demande à être reçu partie appelante, et grossir ainsi l'intérêt des appelants, qui dès lors dépasserait de beaucoup le montant fixé pour la juridiction de cette cour. S'il nous paraissait nécessaire de permettre à cet héritier de se joindre aux appelants, ce serait notre devoir d'accorder sa motion. Tous les héritiers ont en effet intérêt à avoir une interprétation finale du testament de leur ancêtre. Les appelants ont cependant produit des affidavits qui établissent que leurs intérêts dans la cause excèdent $2,000 et partant la motion de cet autre héritier, mis en cause, est inutile et elle est renvoyée sans frais, ainsi que la motion pour le renvoi de l'appel faute de juridiction.

Il ne nous reste plus qu'à décider la cause au mérite.

Il s'agit du testament de François Evanturel devant Mtre. Petitclerc et son confrère, notaires, en date du 15 mai 1852, qui a déjà attiré l'attention de tous les tribuneaux du pays, compris le Conseil Privé, dans la célèbre cause de *Evanturel* v. *Evanturel* (1). La question soulevée dans la présente instance se rapporte à l'interprétation de l'article 6e du testament qui dispose finalement des biens du testateur en faveur de ses petits-enfants. Toutes les parties admettent qu'il y a substitution et qu'elle s'ouvre pour autant au décès de chaque grèvé. Mais le partage doit-il se faire par souches ou par têtes? C'est là et là seulement qu'il y a divergence d'opinion.

L'article 6e du testament déclare :—

Quant à la propriété de mes dits biens, meubles et immeubles généralement quelconques que je délaisserai au jour de mon décès, je la donne et lègue aux enfants légitimes de mes enfants, qui seront mes petits-enfants ; *pour par mes petits-enfants, jouir, faire et disposer de mes*

(1) 5 R. L. 606 ; 1 Q. L. R. 74, 144 ; L. R. 6 P. C. 1.

dits biens en pleine propriété et par égales parts et portions entre eux, à compter du jour que la dite jouissance et usufruit donnés à mes enfants cesseront, les instituent mes légataires universels en propriété.

La cour de première instance, (Cimon J.) décida que les petits-enfants étaient appelés par têtes et non pas par souches. La cour d'appel, (Bossé et Würtéle JJ., différant) jugea tout le contraire. La Cour d'Appel procède comme si le testateur avait chargé les enfants de rendre à leurs propres enfants. Je ne lis pas le testament de cette façon.

Il me semble que les enfants sont chargés de rendre à tous les petits-enfants du testateur collectivement, sans distinguer s'ils sont leurs propres enfants ou simplement leurs neveux et nièces. Nous sommes unanimement d'opinion que telle fut l'intention du testateur, telle qu'il l'a manifestée en son testament. L'opinion du juge Cimon et celle du juge Würtéle expriment si parfaitement les motifs qui conduisent à cette conclusion, qu'il nous suffit d'y renvoyer les parties. Nous nous contenterons d'une courte citation de l'opinion de M. le juge Würtéle :

In the first place, the words used in clause six, by which the testator gives the ownership of his property to his grand-children, instituting them, collectively, his universal legatees in ownership, are plain, distinct and capable of having a legal sense and effect and they should be construed according to their literal import and plain meaning. The words are that he bequeathes his property, in ownership, to his grand-children from the death of his children, to be owned and enjoyed by them, and to be divided among them in equal shares from the day that the usufruct given to his children should cease to exist. The plain meaning of this disposition, it seems to me, is that all the grand-children participate in the legacy and that the property representing the fifth of the revenue given to each of the testator's children on the opening of the substitution for that portion of his estate, is to be divided among all the grand-children then living, in equal shares, by heads and not by roots. The words being plain and not ambiguous, the literal import should be followed, for the function of the court is to construe or interpret the testator's words and to give effect to them and not to make a will for him by a supposition as to what his inten-

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tion was, or by adding or implying any words which may be thought to have been omitted; and it must be borne in mind that legal effect can be given to the words and expressions contained in this clause. There is nothing in the context which can indicate that that cannot be the meaning of words used, nor that it was the intention of the testator that the words should not be taken in their ordinary sense.

L'appel est accordé et le jugement de la cour supérieure rétabli, avec dépens devant toutes les cours.

DAVIES J. concurred in the judgment of the court for the reasons stated by His Lordship Mr. Justice Girouard.

MILLS J.—In this case I concur in the judgment of my brother Girouard.

I hold that the children took from the testator a life interest and that, upon the death of the children, the property went to the grand-children, so that the grand-children took directly under the will from the testator and so took *per capita* and not *per stirpes*.

ARMOUR J.—The question for our determination arises upon the will of François Evanturel, senior, who died on the seventeenth of May, 1852, and the following provisions of the will are those necessary to be considered in arriving at such determination.

Fourthly: I give to Marie Anne Bédard, my wife, the enjoyment and usufruct of all the rest of my property, moveable and immoveable, for my said wife to have the enjoyment and usufruct of all my said property during her lifetime, from the day of my death, instituting my said wife my usufructuary legatee, without her being obliged to have an inventory made of my said property; my said wife being obliged to pay an annual life rent of sixty pounds to each of my children born of my present marriage with her who shall not be married on the day of my death, from the day of their respective marriage and during the lifetime of my said wife, which life rent shall be payable to the husband of each of my daughters who would be married and would die before my said wife;

Fifthly : I order that, after the death of the said Marie Anne Bédard, my wife, if I die before her, all my furniture, animals, carriages and other moveables, which I shall die possessed of, be sold by public or private sale by my testamentary executor hereinafter named, and that the price thereof be deposited by my said testamentary executor in one of the savings banks of this city and that the price of my said moveables be used solely for the keeping of and repairs of the houses and dependencies which I shall die possessed of; and I order further that, after the death of my said wife, the enjoyment and usufruct of the rest of my property moveable and immoveable whatsoever, which I shall die possessed of, pass and go to the children born and to be born of my present marriage with my said wife ; towhich, my said children, I give and bequeath the enjoyment and usufruct of my said property, for my said children to have the said enjoyment and usufruct during their lifetime, from the day of the death of Marie Anne Bédard, their mother, until the death of each of my said children respectively, my said children to divide by equal shares between them the income of my said property ; and, if any one of my said children should die without leaving any legitimate issue of his marriage, or if he should die before having been married, then and in such case, I order that the share of my said child who should so die without leaving any legitimate issue, or before having been married, in the income of my said property, pass and go to my other children then living, who shall enjoy the said share by equal parts between them during their lifetime as aforesaid ; this present legacy is so made to my said children on the express condition that the share coming to each of them in the income of my said property shall not be seizable in any manner whatsoever by any of the creditors of my said children, respectively, for such is my will ;

Sixthly : As to the ownership of my said property, moveable and immoveable whatsoever, which I shall die possessed of, I give and bequeath it to the legitimate children of my children, who shall be my grand-children, for my said grand-children to enjoy possess and dispose of my said property in full ownership and in equal shares between them, from the day on which the said enjoyment and usufruct given to my children shall cease, instituting them my universal legatees in ownership.

And the question is. Was it the intention of the testator that his grand-children should take *per capita* or *per stirpes* ?

In my opinion, the grand-children take *per capita* and not *per stirpes*.

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The language of the will is plain and unambiguous and I do not see how the testator could have more clearly expressed his intention that his grand-children should take per capita, than he has done.

In my opinion, the appeal should be allowed with costs here and below.

Appeal allowed with costs.

Solicitor for the appellants : *C. E. Dorion.*

Solicitors for the respondents : *Malouin, Bédard et Chalout.*