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*March 4, 5.
*Oct 7.

LÉOPOLD MASSON AND OTHERS.....APPELLANTS;

AND

MARGUERITE MASSON AND OTHERS ..... } RESPONDENTS;

AND

LOUIS DE LOTBINIÈRE HARWOOD, MIS-EN-CAUSE ..... } RESPONDENT.

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

Construction of will—Substitution—Trust—Death of grevé—Accretion—Partition—Apportionment in aliquot shares—Distribution of estate—Partial intestacy—Devolution.

By his will, in 1845, M. devised his estate to trustees charging them with its administration in a manner intended to secure the enjoyment of the revenues by his surviving children and their descendants so long as the law would permit; he provided for the division of his estate into as many equal parts as he should leave children him surviving: "pour chacune de ces parts ou portions de mes biens representer les biens mobiliers et immobiliers dont chacun de mes dits enfants aura seulement la moitié des revenus sa vie durante, ainsi que ci-après pourvu, et pour les revenus de chacune de ces parts ou portions de mes biens être réversibles après le décès de chacun de mes dits enfants aux enfants nés en légitimes mariages d'eux, mes dits enfants, respectivement, et être substitué de descendants en descendants, et ce indéfiniment, ou autant que permis par la loi, en observant que je veux et entends que lors de chaque succession ou transmission de mes biens il en soit fait partage, autant que possible, entre chacun de mes descendants de manière à pouvoir connaître et distinguer la part ou portion des biens dont chacun d'eux aura les revenus sa vie durante."—At the time of his death, in 1847, eight of his children survived the testator and his estate was,

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

accordingly, apportioned so far as then possible, the residue, not then conveniently divisible, being held in suspense as a ninth share to be subsequently divided from time to time as it became possible to do so. Of the eight shares, that attributable to L. M., one of the children, was enjoyed by him up to the time of his death, in 1887, intestate as to the share in question and without issue.

Held, Brodeur J. dissenting.—That, as the will did not give the children and grandchildren of the testator any rights as proprietors in his estate, there was no substitution created by its provisions.

Held, also, Davies and Brodeur JJ. dissenting.—That, on the death of L.M. without issue, the share allotted to him remained vested in the trustees subject to distribution among the children of the testator and their descendants in the same manner and upon the same conditions as if L.M. had pre-deceased the testator and the estate had been originally apportioned into seven instead of into eight parts.

Per Davies J.—As there was no provision in the will in respect to children dying without issue, and as there was no collateral substitution, there was intestacy resulting, on the death of L.M. without issue, in regard to the share allotted to him; consequently, it remained vested in the trustees for the benefit of and to be distributed amongst the heirs of the testator living at that date.

Per Brodeur J. dissenting.—The will had the effect of creating a direct and collateral substitution. At the death of L.M. his brothers and sisters became substitutes and their descendants are *appelés.*

Judgment appealed from (Q.R. 20 K.B. 1) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of Mr. Justice Charbonneau(2), in the Superior Court for the District of Montreal.

The circumstances of the case are shortly stated in the head-note and are fully set out in the judgments now reported. In construing the will, the judgment of the Superior Court adopted the theory of accretion with its practical consequences, holding that the

(1) Q.R. 20 K.B. 1. (2) Q.R. 33 S.C. 108.

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share of Louis Masson had accreted on his death to the seven other branches without forming a degree of substitutions. This judgment was reversed by the Court of King's Bench, which decided that there had been a transmission on Louis Masson's death, counting as a degree of substitution.

Hon. A. R. Angers K.C. for the appellant Léopold Masson. The will in question created a substitution by a joint disposition to co-legatees, directing that the same be reversible from the testator's children to their children respectively, and substituted from descendants to descendants, and this indefinitely or as far as allowed by law. This means, under art. 932 C.C. and in conformity with the jurisprudence anterior to the Code, that the children of the testator are the first institutes, the grandchildren the second institutes, and the great-grandchildren the final substitutes. *Mitchell* v. *Moreau*(1). The testator bequeathed his estate to trustees, and disposed of it by joint disposition in the manner and form indicated by art. 868 C.C. which gives rise to accretion in favour of co-legatees in the event of one of them dying without issue, thus permitting the testator's estate to reach his great-grandchildren. By art. 868 C.C. accretion takes place in favour of the legatees in the case of lapsed legacies, when such legacies are made in favour of several persons jointly, and by art. 901 C.C. every testamentary disposition made under a condition which depends on an uncertain event lapses if the legatee die before the fulfilment of the condition. The nature and the terms of the will constituted a legacy of the universality of

(1) 13 R.L. 684.

his estate, with substitution to several jointly,—to his surviving children by one and the same disposition,— without assigning the share of each co-legatee in the thing bequeathed, but only indicating equal aliquot shares in the thing bequeathed, and, consequently, the share of which Louis Masson, deceased without issue, received one-half of the revenue passed by accretion to the bulk of the estate for the benefit of the other co-legatees, as if he, Louis Masson, had never existed and the estate of Joseph Masson had originally been divided into 7 aliquot shares instead of 8. We refer to *Joseph* v. *Castonguay*(1), where Lafontaine C.J. and Aylwin, Duval, Meredith and Mondelet JJ. held, that the *usufruit* usually created by the same deed of donation accrued to the surviving usufructuaries. This is acknowledging the right of accretion when the legacy is created by one and the same disposition. See also *Denis* v. *Cloutier*(2); Coin-Delisle "Donations et Testaments," pp. 512, 516.

In counting the degrees of substitution, care must be taken not to adopt the mode indicated by the Ordinance of 1747, posterior to the establishment of the Superior Council of Quebec, which was not registered in the province, and never was in force therein. We must revert to the Ordinance of 1629, which, by article 124, declares:—

"Voulons que dorénavant que les degrés des dites substitutions et fidéicommis par toute Notre Royaume soient comptés par tête et non par souches et générations. C'est-à-dire chacun de ceux qui auront appréhendé et recueilli le dit fidéicommis fasse un degré, *sinon que plusieurs d'eux eussent succédé en concur-*

(1) 3 L.C. Jur. 141; 8 L.C. Jur. 62.

(2) 14 Q.L.R. 115.

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rence comme une seule tête, auquel cas ne seront comptés que pour un seul degré."

This article 124 of the Ordinance of 1629 is the source of article 868 of our Civil Code, which decrees that there is accretion to the benefit of co-legatees in the case of lapsed legacies, when such legacies are made in favour of several persons jointly by one and the same disposition, and the testator has not assigned the share of each co-legatee in the thing bequeathed. Directions given to divide the thing jointly disposed of into equal aliquot shares do not prevent accretion from taking place. In other words it is repeating the exception contained in article 124 of the Ordinance and expressed by the words, "Sinon que plusieurs d'eux eussent succédé en concurrence comme une seule tête, auquel cas ne seront comptés, que pour un seul degré." Our article 868 is not new law. Our Code is declaratory of what the law was in the Province of Quebec before its promulgation. See Bourjon (2 ed., 1770), Questions de Droits, 293.

The Ordinance of 1747, which was never in force in the Province of Quebec, provides a different mode of counting the degrees. The Chancellor d'Aguesseau is of opinion that the exception of article 124 of the Ordinance of 1629 expressed by the words, "Sinon que plusieurs d'eux succédé en concurrence comme une seule tête," is in compliance with the ancient law of the Custom of Paris. In the questions by him submitted to the courts and parliaments, preparatory to the Ordinance of 1747, is the following:—

"10ième question: "Si ceux qui sont appelés conjointment à une substitution doivent être comptés

pour un seul degré ou pour plusieurs ?" *Jones* v. *Cuthbert*(1).

Le Procureur-Général de Paris répond:—

"Cette question toute unie n'en est pas une; en effet, si plusieurs appelés successivement forment plusieurs degrés, la même raison veut que plusieurs appelés conjointement ne forment qu'un degré; aussi, tous les auteurs, les parlements, l'Ordonnance de 1629, les arrêts de M. le Président de Lamoignon, tout se réunit pour cette décision.

"On pourrait, peut-être, pour lever toute l'équivoque, ajouter le mot *concurremment* qui se trouve dans l'article 44 de ces arrêtes; on pourrait même y ajouter pour lever encore un autre doute, ce que le parlement d'Aix a ajouté, soit que les substitués acquièrent de leur chef, ou caducité, ou par accroissement, quoique on croie ces expressions surabondantes."

Pothier teaches that, notwithstanding the Ordinance of 1747, accretion takes place in the case of joint disposition (Traités des Donations et Testaments, No. 342, Bibliothèque du Code C. de Lorimier, vol. 7, p. 46, on article 868).

In *Page* v. *McLennan*(2), there was assignation of shares, and accretion could not take place; it was so likewise in *McDonald* v. *Dodd*(3). In *Perrault* v. *Masson*(4), Pagnuelo J. has erred in counting the degrees and his opinion is *obiter*. We refer to *Taschereau* v. *Masson*(5) for the learned discussion by Loranger J., and the authorities cited by him. See also *Prévost* v. *Lamarche*(6); *De Hertel* v. *Goddard*

(1) M.L.R. 2 Q.B. 44, at p. 55.
(2) Q.R. 7 S.C. 368.
(3) 30 L.C. Jur. 69.
(4) Q.R. 15 S.C. 166.
(5) M.L.R. 7 S.C. 207.
(6) 38 Can. S.C.R. 1; [1908] A.C. 541.

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(1), affirmed by the Privy Council(2); *Fraser* v. *Fraser*(3).

As to the case of Léon Masson, great-grandchild of the testator, representing his father Léon Masson, who pre-deceased Rodrigue Masson, we refer to art. 937 C.C.; in substitutions representation exists when the testator has bequeathed his property in the order of legitimate successions, or his intention to that effect is otherwise manifest. Art. 980 C.C. enacts that when the terms, "children" or "grandchildren" are made use of, without qualification, they apply to all the descendants. Articles 937 and 980 of the Civil Code do not contradict each other. The rule that in substitution there is no representation does not apply where the institutes are designated by a term thus interpreted by art. 980 C.C. This confirms the contention that Léon Masson, great-grandchild of the testator comes to the estate as second substitute in the place of his father, Léon, at the death of Rodrigue Masson. *Marcotte* v. *Noël*(4), *per* Meredith, Stuart and Casault JJ.

Bastien K.C. for the appellants Henri Masson, and others. The executors and trustees, under the will, have not only the seizin provided by art. 918 of the Civil Code, but also the seizin decreed by article 981*b* in favour of trustees. They have the powers of trustees and administrators, they are vested with the seizin of all the property, without reserve or exception, they can revendicate the possession thereof even against the legatees, and the powers given them allow

(1) Q.R. 8 S.C. 72.
(2) 66 L.J.P.C. 90.
(3) Q.R. 16 K.B 304
(4) 6 Q.L.R. 245.

them, without the intervention of the legatees, to manage the property entrusted to them in the most ample manner possible, and they can claim application of the dispositions of articles 981*b*, 981*j*, and 981*k* of the Civil Code.

According to the terms of the will the partition directed was to determine the property from which revenues were to be received by the substitutes in the first degree. In the partition actually made, the estate was divided into eight equal parts, and the sub-partitions, to be subsequently made were, in the same manner, definitely to determine what property was to be enjoyed by the substitutes in the second degree. As the children of the testator received only a moiety of the revenues, upon their death, the property was transmitted, through the testamentary executors, by a partition which was the necessary consequence of the transmission. Why should the testator order partitions upon each of such transmissions if the first partition was not of a permanent character, and why partition property which is not to be transmitted in full ownership to those finally called to receive it ? The will, in speaking of the partition with which we are concerned, reveals the intention of the testator with regard to the successive partitions. The share assigned to each child attributes to such child a moiety of its revenues, and the whole revenue to the grandchildren and remoter descendants of the testator. This partition prevented indivision both as regards the revenues and as regards the capital of the estate. The legatees did not have to submit to a partition, but accepted that ordered by the testator, in such a way as to divide the revenues of his property between all his children and all his descendants. But

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it does not follow that the late Louis Masson became absolute owner of the share of which he had a moiety of the revenues, and, even had he become the owner thereof, it was only subject to a resolutory condition.

Testamentary executors are what Thevenot d'Essaule calls charged administrators simply, who do not take the property if the legacy fails through failing of legatees, but are simply ordered to deliver according to the wishes and intention of the testator. (Thevenot d'Essaule, ed. Mathieu, 538, 539.) In the present case, the persons benefited are beyond doubt the children and descendants of the testator; and it is in an exclusive manner that the *de cujus* wished to transmit his property for the greater advantage of his children and descendants. By this will the testator created a trust. Rolland de Villargues, *vo.* "Fiducie." Trusts have been recognized and consecrated by the Civil Code in arts. 981*a et seq.* But this species of disposition, authorized by the Roman law, was recognized by and practiced under the ancient law, and was never prohibited by the Civil Code. See Merlin, Répertoire, *vo.* "Fiduciaire héritier." Even to-day trusts may be constituted, although article 896 of the Code Napoléon, again prohibiting substitutions, declares null any disposition by which the donor, the instituted heir, or the legatee, is ordered to deliver to a third party. The same must *a fortiori* be true under a system of law which recognizes substitutions and favours them. Whether or not the will creates a simple trust is always a question of interpreting the wish of the testator. In *Re Réné Masson* Mr. Justice Jetté (28th of June, 1889) found in the testamentary dispositions now in issue all the elements of a trust:—

"Considering that this disposition creates an actual trust limited by the testator to the degrees permitted in substitutions, that is to say, two degrees beyond the person first called, in conformity with the Ordinance de Moulins in force in this country before the promulgation of the Civil Code, article 869 of which is a reproduction of the said Ordinance in that respect, and that, in consequence, the property so entrusted by the testator to his fiduciary legatees could not be delivered in whole or in part to any other than to those actually called to possess them in full ownership;—Considering, moreover, that even supposing that the will of the said Joseph Masson created only a simple substitution, it results from that that the intention of the testator, in any event, was that the property of which he died possessed, as well as that purchased with the accumulating moiety of the revenues thereof, would be transmitted *to his great-grandchildren,* and to bequeath to his children only one-half of the revenues." See art. 981*a* C.C.

Considering the dispositions of the will, the ample powers conferred on the testamentary executors, and the lapse of time intervening between the death of the testator and the first delivery of the *revenues* to the children appointed to receive them, we find all the elements of a trust as defined by the Code and the jurists. The estate is transmitted, without reserve or exception, to the executors as trustees for the benefit of the children, for the greater advantage of the children and descendants, and in favour of the said children to whom the testator could validly bequeath his property. In *Freligh* v. *Seymour*(1), it was held

(1) 5 L.C.R. 492.

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that a fiduciary bequest was valid in Lower Canada, and the dispositions concerning trusts, reproducing the old law, apply to the executors in this case, because they have received from the testator wider powers than are usually conferred upon testamentary executors. Arts. 921, 964 C.C.

Can the will be interpreted as containing a mutual trust, or an accretion ? The trust may be mutual or reciprocal when two persons are mutually charged, each in favour of the other. According to the Roman law, this species of trust might be conjectured; nevertheless the authors, without other rules than the Roman law to follow, have taught that a reciprocal trust could not be admitted without necessary proof. Thevenot d'Essaule, Nos. 408, 409, 413. Under our law substitution cannot be assumed, and conjectural substitutions are abolished. Article 937 C.C. lays down that representation does not take place in substitutions, unless the testator has ordered that the property shall devolve in the order of legitimate successions, or his intention to that effect be otherwise manifested.

Article 868 C.C. provides for accretion in favour of legatees, in the event of any part of the bequest failing, where the whole bequest is made to several persons jointly. This disposition is based upon the presumed intention of the testator. If the late Louis Masson did not take the legacy in the sense of this article, and if, his right being limited to the reception of the one-half the revenues of his share, his decease without issue rendered the bequest to him void, the property from which he derived his revenue did not thereby escape the operation of the trust. But the rules mentioned in art. 868 may nevertheless be ap-

plied by analogy, even when the legatees have come into the property. The testator could manifest his intention of providing for accretion, even when the legatee has come into the property. The indication of sharing share and share alike in the partition of the thing bequeathed by a joint disposition does not prevent accretion, and this axiom may guide us where it is evident, under the terms of the will, that the testator wished to stipulate accretion, even when his legatees have taken the succession in the legal sense.

In *Denis* v. *Cloutier*(1) it was held that, over and above the accretion provided for by articles 868 *et seq.* C.C., there may be accretion, if the testator so intended. See *Taschereau* v. *Masson*(2); 4 Marcadé, 141, No. IV. of art. 1044; 14 Laurent 300; Coin-Delisle, "Donations and Wills," page 512, No. 3 and page 516.

The joinder of issue is confined to the question whether the share of which the late Louis Masson enjoyed one-half the revenues should come to the descendants of the testator by way of accretion or substitution. If he had had issue, the revenues of his share would have been transmitted to his children, there would have been a transmission of property to them. But he had no issue and, therefore, his share must be partitioned among the descendants of the testator.

Must the share of Louis Masson be taken and divided into seven equal and distinct shares to add each of these subdivisions to the other shares; in other words, must share No. 2 be made to disappear and be spread over the other shares, as if share No. 2 had never existed? Must each of the other

(1) 14 Q.L.R. 115. (2) M.L.R. 7 S.C. 207.

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shares be increased by the addition of a seventh of share No. 2 in order that this share may be taken by the descendants of the testator called to come into the other shares? Is there an obligation, even under the terms of the will, of merging the shares? Does not the transmission of share No. 2 to the descendants of the testator take place irrespective of the other shares forming part of the estate? Do not the descendants of the testator, being jointly called by the will to take the succession or transmission of share No. 2, of which Louis Masson was the legatee in so far as one-half the revenues were concerned, constitute a degree, each for the share he is to take, charged with the obligation of re-delivering it to their posterity, since they are to receive only the revenues thereof? If the possibility of adding to the share of each of the legatees one-seventh of share No. 2, by way of accretion, as if the late Louis Masson had never existed and as if that share had always formed part of the other shares, what would be the result? In each of the shares, the accretion will reach the great-grandchildren in the same manner as the original share.

In order to hand down the whole estate to the great-grandchildren it is absolutely necessary to admit that, at the death of the late Louis Masson without issue, his share was transmitted by way of accretion to the testator's descendants, just as if Louis Masson had never lived, and as if the succession of the Honourable Joseph Masson had been originally divided into seven equal shares. By the terms of art. 625 C.C. the children or their descendants succeed equally and by heads when they are in the same degree and called personally, and they succeed *par souche* when some or

all of them are called by way of representation. Why should not a co-legatee have his share increased by a certain part of the estate, and why should the children of a co-legatee pre-deceased not come in lieu of the said pre-deceased legatee by right of representation, if the testator so wished, to give effect to his intention, which is that the estate should be handed down to his great-grandchildren ?

In the matter of accretion, it is a constant and well recognized rule that accretion is from share to share. *"Quoniam portio * * * veluti alluvio, portioni adcrescit."* (Papinian.) See, also, Demolombe, No. 390. By adopting the theory of accretion, which seems ordered by the testator in the most formal manner, and which necessarily results from the dispositions of the will, all the administration of the estate becomes well ordered. The intention of the *de cujus* is carried out, his wishes are respected, and the desire of transmitting all his estate without exception or reserve, as far as possible, to his posterity and for the greater advantage of his children and descendants is given effect. In this manner the estate is given definitely to the great-grandchildren in each share, increased by the accretion of shares which fail of their object, without violating the rule which prohibits substitutions taking place more than two degrees beyond the instituted legatee, and nevertheless carrying out to the full the instructions of the testator.

Otherwise an attempt is made to make definitive and final owners, of the property left by Louis Masson, the children of Madame Bossange, Madame Douvreleur, Roderick and John Masson, who are only the grandchildren of the testator, and to exclude from the ownership the only great-grandchildren of the tes-

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tator, the descendants of Henri Masson, issue of the marriage of Dr. Harwood with the late Marie Masson, who had survived her co-legatee Joseph Henri Masson, and took in the second degree the share of the latter in the estate of the late Louis Masson, seeing that the will of the said late Marie Masson instituted her consort universal legatee of her property, while in the share attributed to the late Honourable Edouard Masson, the children of Joseph Edouard Masson, who are the great-grandchildren of the testator, would be only called in the first degree to the share accruing them in the property left by Louis Masson. The only great-grandchildren to come into their share as such in the property left by Louis Masson would be the children of Wilfred Masson and Edouard Masson, sons of Réné Masson.

This latter supposed condition of affairs, as may readily be seen, if legally correct, would, nevertheless, be contrary to the general dispositions of the will. The theory of accretion is surer, more natural, more equitable between the legatees, and especially in greater conformity with the intention of the testator. *Eadem vis est taciti atque expressi.*

It is better to admit this theory of accretion, which seems just, more in conformity with intention of the testator, and which allows the disposition made by him of his property to subsist in its entirety, giving his children one-half of the revenues, to his grandchildren the whole of the revenues, and the ownership to his great-grandchildren.

Mignault K.C. for the respondents. The case is based on the legal proposition that on the death of Louis Masson, there was accretion of his share in

favour of the mass of the estate just as if Louis Masson never had existed. The respondents submit that this share passed by transmission to the other descendants of the testator by roots, such transmission counting as a degree of substitution. All parties admit that the will created a substitution, in favour of the children of the testator and their descendants, extending as far as allowed by law. Therefore, it is contended that there was accretion. The respondents submit that such accretion was juridically impossible, and that the only conclusion that can be adopted is that Louis Masson's share was transmitted, this transmission exhausting one degree of the substitution.

The only article of the Civil Code which treats of accretion is 868. It may be compared with arts. 1044 and 1045 of the French Code. Are these provisions in conformity with the law as it existed before the Code? The will was made and the testator died before the codification of our civil laws. None of the articles of our Civil Code define accretion. Let us define accretion by giving an example. Thus, A. bequeaths his house jointly to B. and to C. Each legatee receives a title to the whole house, but as they are two, if both accept the legacy, they will have to divide the house: *concursu partes fiant.* But if B. dies before the testator, or if he refuses the legacy, there is no conflict of title, and C. whose title extends to the whole house takes it in its entirety. It is in this sense that it is said that accretion takes place from B. to C. The authors observe that instead of the word *"accroissement"* it would be more apt to say that there is *"non-décroissement."* What characterizes *accretion* and distinguishes it from *transmission,* is that C. receives nothing from B. or

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through B. His title to the whole house exists in the will. The pre-decease of B., or his refusal to accept the legacy, rids him of a competitor and that is all.

But few authors have attempted to define *accretion,* and it really seems unnecessary to do so for its nature and effects are well known and are clearly shewn by the example given above. Reference, however, may be had to the definitions given by Fuzier-Herman, *vo.* "Accroissement," No. 1; Pandectes Françaises and Ferrière, "Dictionnaire de droit, eodem verbo." Pothier, vol. 8 (Bugnet) "donations testamenaires," No. 340, thus indicates the nature of the right of accretion: "Les colégataires d'une même chose, ou d'une même somme, sont légataires du total de la chose, ou de la somme léguée, ce n'est que par leur concours que la chose léguée, quoique léguée à chacun d'eux en total, ne pouvant pas néanmoins appartenir à chacun d'eux pour le total, *cum duo pluresve unius rei in solidum domini esse non possint,* se partage entre eux.

"De là il suit que, *si quelqu'un des colégataires ne recueille pas le legs,* soit par son prédécès, soit par son incapacité, soit parce qu'il lui plait de le répudier, la part qu'il aurait eue dans dans cette chose doit accroître à ses colégataires *jure accrescendi,* ou plutôt, *jure non decrescendi:* car chacun des colégataires, étant légataire du total de la chose léguée, n'y ayant que le concours de deux ou plusieurs légataires qui la partagent entre eux, lorsque l'un d'eux ne concourt pas, le total demeure de plein droit à l'autre."

In order that accretion may be said to exist, it is necessary that one or more of the legatees fail to take the legacy. Once they are vested, accretion is abso-

lutely impossible. This is well shewn by the last paragraph of art. 868 C.C., which says that the right to accretion applies to gifts *inter vivos* made in favour of several persons jointly, *when some of the donees do not accept.* A legacy cannot be said to have lapsed when all the legatees have accepted it as in the present case. See also Coin-Delisle, "Donations et Testaments," on art. 1044 C.N., No. 9. Even where a testator directs that if one of his legatees die without children, after having been vested with the legacy, his share shall accrue to the other legatees, the authors say that this is not accretion, but a transmission creating a substitution. See Demolombe, vol. 18, No. 113: Dalloz, Rép. *vo.* "Substitution." No. 220 *et seq.*; Fuzier-Herman, Rép. *vo.* "Substitution" No. 279; Baudry-Lacantinerie "Donation et Testaments" Nos. 3152, 3153, 3154.

The lapsing of the provision in favour of the substitute in a substitution (*i.e.* of *la charge de rendre*), can never give rise to accretion. The only question then is to ascertain to whom the property devolves, since there are no substitutes who can take it. If we find in the will expressions which shew that the testator intended that the property should remain in his family notwithstanding the death of one of his legatees, as in the present instance, the property will not go out of the estate of the testator to form part of the estate of the institute, but will be transmitted to the other descendants of the testator, and this without effacing the person of the institute, who will be considered as a first degree of the substitution with respect to the testator's other descendants as he would have been a first degree as to his own children. This is the only way to prevent the property from falling

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into the estate of the institute, thus defeating the substitution, accretion being impossible.

Mr. Justice Charbonneau seems to have confounded two essentially different things, *accretion* (art. 868 C.C.) and the *right of return* (art. 779 C.C.), for the species of accretion to which he refers, an accretion which would bring back to the general mass property which had been taken out of it, and this from the death of the legatee who had received the property, would be nothing else than a right of return or of taking back, rather than a substitution. When the right of return is stipulated, the thing received by the donee returns to the donor or to the persons indicated by him. In the case of a substitution, the thing passes from the donee or institute who had received it to the persons who are to take it after him. Any right, whether it be termed a right of return, a substitution, or even (but incorrectly) an accretion, whereby the thing passes from the beneficiary to a person other than the donor, or from the legatee to the general mass of the estate, is nothing else than a substitution. (See Demolombe, vol. 18, Nos. 110 and 111).

Moreover, real accretion differs essentially from the right of return or of substitution. The former exists by virtue of a legal presumption and without an express stipulation, provided, of course, that the required conditions exist; the latter must be stipulated. The first supposes that the donee or legatee has not been seized of the thing given; the second requires a vesting in the donee or legatee, since the thing *comes* or *returns* from him. Accretion confers no right, it merely prevents a right already given from being diminished or shared by another; the right of return, on the contrary, when it operates in favour

of the donor's heirs, and the right of substitution are attributive of right, and although this right comes from the donor it is transmitted through the person of the first beneficiary, *obliquo modo*.

We find a conclusive answer in the judgment of the Superior Court. Since Louis Masson's share *returns* to the general mass, since it *returns* to the seven other branches of the estate, and *from the day of the death of Louis Masson*, it follows that there is a transmission from Louis Masson, who had been seized, to the general mass, and this is precisely the effect of a substitution, so that we find that accretion as defined by the judgment is really a transmission by means of substitution. It seems more in accordance with the testator's intention to conclude that this substitution exists than to imagine a return to the general mass which would have the strange effect of placing properties, which were at the first degree in the person of Louis Masson, in the same degree in the case of Rodrigue Masson, and in the third and final degree in the person of the plaintiff.

Another condition of the right of accretion is that the legacy be made jointly to several legatees. There is no joint legacy here. According to the direction of the testator, the executors made a partition, on the 11th April, 1848, forming eight shares which they attributed to the eight children, and plaintiff alleges that this partition is final. The result is that there was, not a legacy of the whole estate to the children jointly, as held by the Superior Court, but a legacy to each child of a separate and specific portion of the estate which the testator ordered to be set aside and separated from the other shares immediately after his death. In other

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words, there was not, in favour of each legatee, a bequest of the whole estate, which would be essential to give rise to accretion, but a bequest of certain determinate property, which was to be set aside by the partition ordered by the will. Moreover the direction to divide the estate into equal shares is not made in order to carry out a joint legacy, but it bears on the title itself of the legatees, who receive nothing more than certain specific properties, and this also excludes any possibility of accretion. There is no joint legacy nor universal legatees in Mr. Masson's will. On the contrary, the legacy to each legatee is only of certain properties to be set aside by the partition, that is to say a legacy by particular title; or, at the most, a legacy of an aliquot share, or a legacy by general title, and in either case there can be no accretion from one legatee to another. See Dalloz, 1880, 1, 339, and especially the reporter's note. We may add that Mr. Masson expressly excludes any possibility of accretion by pre-decease, for he bequeaths his estate only to such of his children *as survive him.*

The distinction between a universal legacy and a legacy by general title is shewn in a note to Sirey, 1882, 1, 176. It seems clear to us that Mr. Masson intended to definitely limit each legatee (and his descendants) to the property assigned to him by the partition.

There are several conclusive answers to the contention based on the words of art. 868 C.C., "directions given to divide the thing *jointly disposed of* into equal aliquot shares, do not prevent accretion from taking place." In the first place the estate is not *jointly disposed of.* The will was made and the testator died before the Civil Code came into force

and the question as to the existence or non-existence of accretion will have to be determined according to the law then in force, for it is held that articles 1044 and 1045 of the Code Napoléon and, consequently, our own art. 868, changed the old law. See Baudry-Lacantinerie, "Donations et Testatments," vol. 2, Nos. 2, 904 *et seq.;* Demolombe, vol. 22, No. 366.

According to the old law, it is clear that no question of accretion can arise even if the contrary could be contended under art. 868 C.C. See Pothier, ed. Bugnet, vol. 8, "Donations Testamentaires," No. 349; Bourjon, cited by the codifiers under art. 868 C.C. (see DeLorimier, "Bibliothèque du Code Civil," vol. 7, p. 61); Domat (ed. Rémy), vol. 2, p. 609.

It follows, whatever construction may be given to article 868 C.C., that according to the law in force at the time of the will, no question of accretion can arise.

As to the contention by Henri Masson *et al.,* the executors of the Masson estate, that Mr. Masson left to his children and descendants nothing but the revenues of his estate, and that he bequeathed the property to his executors and trustees who alone are seized thereof, it is to be remarked that the words *"je donne et légue"* are used only in the clause concerning the executors. This construction of the will cannot be sustained. The testator, it is true, bequeathed his property to his executors, but only *"à titre de fidéicommis."* In other words, he named them as trustees of his estate, adding that he did so *"pour faciliter l'exécution de mes dispositions testamentaires et pour d'autant mieux garantir la réversion des revenus de mes biens à mes dits enfants et descendants."* The executors have undoubtedly *"la saisine de fait"* but they have not *"la saisine de droit."* Moreover, if on

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the one hand the children only receive a legacy of revenues, and if on the other hand the executors are not left the property itself as owners subject to the payment of the revenues, then the property or the title of ownership is left to no one. It is clear that the executors are not owners, they are seized merely as administrators, and in the event of the legacy lapsing as to the children, they could not claim the benefit thereof (art. 964 C.C.). This being the case, the only possible conclusion is that the ownership vested in the children subject to the substitution in favour of their children and grandchildren, for the ownership or the title can never remain in suspense.

It is immaterial that the children get only half of the revenues of their shares, for the testator could have left the naked ownership to them and the whole enjoyment or usufruct to another, and, in that case, there could be no doubt that they were vested with the ownership. What is important is that, unless it is admitted that the children received the ownership, subject to the substitution, then no other owner can be discovered. Consequently the construction which the executors put on the will would lead to an obvious absurdity, leaving, as it does, the ownership in suspense. It is immaterial that the executors have fiduciary powers, since it is certain, as found by all the courts, that the trust is merely an ancillary trust created by the testator to carry out the substitution of his property.

As to some decisions on which the appellants rely: In *Joseph* v. *Castonguay* (1), the head-note says: "*Accroissement* takes place in a donation of the usufruct

(1) 3 L.C. Jur. 141.

even by *acte entre vifs,* if such deed, by its disposition and by its clear expression, create a *substitution réciproque.*" But all that was really decided was that there was in the case a reciprocal substitution. The decision was reversed in appeal(1), and in the reversing judgment there is no mention of accretion.

In *McDonald* v. *Dodd*(2), the Court of Appeal declared that no accretion was possible where the testator had assigned to each legatee a share in the thing bequeathed.

In *Denis* v. *Cloutier*(3), the testator directed that, in the event of the death of one of his children without issue, the share of usufruct of the deceased should go to the survivors. The court gave effect to this clause, expressing the opinion that the testator could order accretion in other cases than those mentioned by the law.

Prévost v. *Lamarche*(4), was reversed by the Privy Council(5). The question of accretion was discussed by Mr. Justice Girouard, but the opinions of the other judges are not given. In the Privy Council this question was duly considered and it was held that there was nothing in the will which would justify the court in deciding that the testator intended that there should be accretion on the death of one of his children without issue. The Prévost will differs in essential points from the Masson will. In the former there was a real joint legacy; the grandchildren were expressly named universal legatees, and the immovables were to be transmitted to them *en nature.* In the Masson will the legacy is neither joint nor universal and the

(1) 8 L.C. Jur. 62.
(2) 30 L.C. Jur. 69.
(3) 14 Q.L.R. 115.
(4) 38 Can. S.C.R. 1.
(5) [1908] A.C. 541.

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property does not go *en nature* to the final substitutes. In each case, however, the partition between the children was final. This point is very important and was so considered by the Privy Council in the *Prévost Case*(1). The partition directed by the testator in order to separate forever the shares of his children was final. This partition produced with regard to Louis Masson and his brothers and sisters all the effect given by art. 746 C.C. The partition being final, property which fell into Louis Masson's lot, and which, by the presumption of article 746, must be held to have never belonged to his brothers and sisters, cannot pass to the latter otherwise than by transmission of the nature of a substitution.

On the death of Louis Masson without issue, the property which formed his share was transmitted by substitution to the other descendants of the testator, this transmission counting as a degree in the substitution as to the property so transmitted. Mr. Masson did not in express terms mention the case of one of his children dying without issue, but he says "Je veux et entends que *lors de chaque succession* ou transmission de mes biens, *il en soit fait partage,* autant que possible, *entre chacun de mes descendants.*" This clause follows the provision wherein the testator substitutes the share of his estate which he leaves to each of his children, from descendants to descendants, and this indefinitely or as far as the law allows. The clear intention of the testator, in case one of his children died without issue, was that the share of the child so dying should be transmitted to his other descendants, as he undoubtedly intended if the deceased left chil-

(1) [1908] A.C. 541.

dren that the latter should be substituted to him in the share so bequeathed. He desired that his estate should be transmitted to his remotest posterity and, because he did not mention the case, easily to be foreseen, of the death of one of his legatees without issue, can it be contended that he was willing that the share of this legatee should escape from the indefinite and perpetual substitution which he desired to establish? And there is no other alternative, accretion being juridically impossible. Since all parties admit that the testator desired to transmit his property to his remotest posterity, they must also admit that he intended that the share of a child dying without children should be transmitted to his other children. The only way in which it can be transmitted is by means of a substitution in favour of his other children. Such a substitution does not rest on suppositions or on conjectures, but it is clearly based on the intention of the testator. (Art. 928 C.C.). Therefore, the share of Louis Masson was transmitted to the descendants of the testator above named, and by virtue of this substitution, which transmission counts as a degree in the substitution. Pothier, vol. 8, "Substitution," No. 224.

At the time of Hon. Mr. Masson's death (1847) the jurisprudence of the Parliament of Paris was binding in Lower Canada, and it is important to remark that, in confirming this jurisprudence, the "Ordonnance des Substitutions," art. 34, title 1 (which was not registered here), merely expressed the law as it existed under the Custom of Paris.

See also Ricard, "Donations," vol. 2, pp. 420, 421 and 422, Nos. 826 and following, and the foot-note at page 422.

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Thevenot d'Essaule, "Substitutions" (ed. Mathieu) note on art. 34, tit. 1, of the Ordonnance, p. 441. This doctrine was followed in *Jones* v. *Cuthbert*(1).

Jones v. *Cuthbert*(1), was decisive as to the effect of art. 124 of the Ordonnance of 1629 (Code Michaud).

The Ordonnance of 1629 never was followed and has been held to have fallen into disuse. *Jones* v. *Cuthbert*(1); *Stewart* v. *Molsons Bank*(2), *per* Blanchet, J. We also cite: *Page* v. *McLennan*(3); *DeHertel* v. *Roe* (*DeHertel* v. *Godard*)(4). We may refer summarily to two judgments of the Superior Court construing the Masson will. *Taschereau* v. *Masson*(5), holds that the share of Louis Masson went to the general mass by accretion and also that the partition was not final. *Perrault* v. *Masson*(6) decides that the share of Joseph Henri Masson, who died without children, was taken by his sister Madame Harwood by transmission and not by accretion, this transmission counting as a degree of the substitution. These judgments were rendered on actions brought by certain interested parties. It is not claimed that they constitute *res judicata* and we submit that the second judgment is well founded.

In substitutions made by collective terms, to which the family or the descendants are called, it is presumed that the testator intended to call the one after the other, the nearest coming first, the proximity of degree being understood of those who are nearest to the institute who has last possessed. Thus, Louis Masson dying without issue, the testator's descendants who

(1) M.L.R. 2 Q.B. 44.
(2) Q.R. 4 Q.B. 11.
(3) Q.R. 7 S.C. 368.
(4) Q.R. 6 S.C. 101; Q.R. 8 S.C. 72; 66 L.J.P.C. 90.
(5) M.L.R. 7 S.C. 207.
(6) Q.R. 15 C.S. 166.

are nearest to Louis Masson are called to the substitution, the order of legitimate succession being followed. See Thevenot D'Essaule, "Substitutions," Nos. 364, 365, 366, 367, 941, 942, 943, 946, 952, 961, 964, 983, 985, 987, 988, 991, 994.

THE CHIEF JUSTICE.—This action is brought by the appellant, Léopold Masson, against the defendants as fiduciary legatees of the estate of his great-grandfather, the Honourable Joseph Masson. The plaintiff (appellant here) asks for the final partition of that share in the estate which had been assigned to his grand-uncle, Louis Masson, a son of the testator, under a clause in the will recited at length hereafter. I use the word "assigned" because of the very special language of that clause. The respondent, Mrs. Burroughs (Marguerite Masson), daughter of Rodrigue Masson and a granddaughter of the testator, raises another issue by asserting her right to an interest in the same share, on the ground that the will of her grandfather created a substitution in the collateral line of Louis Masson's share, to which substitution she claims to be a final substitute.

The question, therefore, is:—On a true construction of the language used, can we hold with the majority in the court of appeal that the testator created a substitution in the direct or collateral line in favour of his children and grandchildren? Or,—Did he vest his property in fiduciary legatees to be held by them in trust for his heirs as long as the law against perpetuities would permit? (Ordonnances des Substitutions, 1747). Which latter I understand to be the construction put upon the will by the trial judge.

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The facts are: The Honourable Joseph Masson died, in 1847, leaving eight children him surviving. At his death the legatees, as directed by his will, divided his estate into eight shares, and a ninth share was made up of assets of the estate which at the time it was considered difficult to apportion between the eight children. In 1893, this ninth share was, in part, distributed among the other shares; the balance, considerably increased, is still in a state of indivision.

Of the eight shares, No. 2 was assigned to the said Louis Masson, who died, in 1897, without issue and intestate with respect to any interest he might have in his father's estate. The question to be decided is what becomes of that share No. 2 and his (Louis Masson's) interest in the undivided portion of share No. 9. The plaintiff (appellant here) is, as I have already said, the great-grandson of the testator and the grand-nephew of Louis Masson. The *mise-en-cause,* Mrs. Burroughs (respondent here), is the grand-daughter of the testator and the niece of Louis Masson.

I agree in the conclusions reached by Archambeault J., now Chief Justice of the court of appeal, on the issue with Mrs. Burroughs, and would allow the appeal as to her, and dismiss her intervention. I would also allow the appeal on the issue with Léopold Masson; and maintain his action, the whole with costs against the estate.

As to the issue with the grand-daughter, Mrs. Burroughs, I accept the reasoning of the Chief Justice, as well as his conclusion that by his will the testator did not create a substitution in favour of his children and their children, and, in default of grandchildren, in favour of the brothers and sisters reciprocally.

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To succeed, it was necessary for Mrs. Burroughs to establish not only that by his will her grandfather created a substitution in favour of each of his children of a share in his estate, but also that in the case of a child dying without issue that child's share should accrue to his brothers and sisters, children of the testator, as first substitutes. For the reasons given by the Chief Justice of the court of appeal, and to which I can find little useful to add, I have come to the conclusion that the testator did not create a substitution of his estate either direct or collateral. There is no vesting of his property in his children or any of them. There is nowhere in the will to be found the *double libéralité* which is of the essence of a substitution. Dalloz, 1902, 2, 281. Occasionally the word *substitution* is used by the testator, but merely to describe the disposition which he makes of his property. Further, there is nowhere a word which even suggests a substitution in the collateral line. I mean to say that nowhere in the will do I find words which manifest an intention on the part of the testator to give a share of his estate absolutely to one of his children, and, failing issue to that child, then to his or her brothers and sisters. Where in the will *substitution* is mentioned it is in the direct line, from descendants to descendants, and nowhere is reference made to collaterals. It is said that this was an omission on the part of the testator who has otherwise made his intention clear in that he frequently expresses a desire to keep his property intact in his family. But, as has been very lucidly explained by the Chief Justice in the court below, effect may be given to that manifest intention without putting a strained meaning upon the language of the will and inserting in it words which the testator did not use.

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On the main issue, between Léopold Masson and the respondents, fiduciary legatees, I will state my position briefly. Léopold Masson must succeed. In my opinion, Louis Masson, his grand-uncle, took no share, either as institute or otherwise, in his father's estate, except with respect to the revenues as I shall explain hereafter, and, therefore, the appellant takes nothing by or through him. That share in the estate, a portion of the revenues of which Louis Masson, the deceased, enjoyed during his lifetime, remains in the hands of the fiduciary legatees undisposed of, as is the case with share No. 9; and, as the appellant, Léopold Masson, is entitled to the share assigned to his grandfather, so is he, for the same reason, and by virtue of the same title, justified in his demand that the estate of his great-grandfather be disposed of, with respect to him, as if there were originally seven shares instead of eight.

I quite agree that the intention of the testator, clearly expressed, is, to keep his estate in his family indefinitely, or as long as the law would permit, allowing it to increase by the accumulation of all the revenues during the first ten years after his death. At the expiration of that period half of the revenues was to be put to capital account during the lifetime of his children.

In many places in the will, it is also said that none of the testator's children are to have any share or voice in the control or management of his estate, except in so far as they may in time prove qualified for appointment as one of his fiduciary legatees.

Such being his admitted intention, what were the means which, in the then state of the law, the testator could adopt to give effect to it? He might have

created a fiduciary substitution in favour of his children, or their children and of their grandchildren; beyond that limit he could not go. If this method was adopted, then, in the event of the death of a child or grandchild, without issue, the substitution would be at an end and the share of that child or grandchild might be disposed of to a third party and never reach any of the great grandchildren of the *de cujus*. (Thevenot d'Essaule, (ed. Mathieu,) notes at pp. 164 and 161.) It was, of course, as is argued here, in the power of the testator to provide in that case for a collateral or reciprocal substitution in favour of the brothers and sisters of the child dying without issue, but then the property would not reach the great-grandchildren because there could not be more than three degrees in a substitution and that event happens in the case of Mrs. Burroughs, if the judgment of the court below is affirmed. On the other hand, the Quebec law says that a testator may name legatees who shall be merely fiduciary, or simply trustees for charitable or other lawful purposes within the limit prescribed by law, and by taking advantage of that provision it was open to the testator to vest his estate in the appellants, (fiduciary legatees,) who are merely heirs for a special purpose, and to charge them, as mere trustees, to administer his property and to employ it, or deliver it, in accordance with his will. And that is what, in my opinion, the testator has done. He has by the very simple device of disposing of his estate in favour of his fiduciary legatees and by importing into his will the analogy of a substitution, left it in such a way that it must reach at least as far as his great-grandchildren (although in so doing he has provided apparently abundant material for litigation).

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That this result has been accomplished is to me clear. Louis Masson, the deceased, was merely a creditor of the fiduciary legatees for a share in the revenues of his father's estate and had no share in the property of the estate, either as institute or otherwise. The language of the will makes this abundantly clear. After making provision for his children and their descendants out of the revenues of his estate, the testator says:—

> Pour faciliter l'exécution de mes dispositions testamentaires et pour d'autant mieux garantir la *réversion des revenus de mes biens* à mes dits enfants et descendants suivant mes desirs ci-dessus exprimés, je choisis et nomme pour mes exécuteurs testamentaires et fidéi-commissaires, Joseph Bourret, etc.

Then, after having provided for the appointment of their successors, he proceeds to say in the following paragraph:—

> Auxquels dits fidécommissaires, remplaçants ou successeurs *je donne et lègue, à titre fidéi-commis,* tous mes dits biens meubles et immeubles, propres, etc., etc.,

that is to say, the universality of his estate. By those words, the whole estate of the deceased — the universality in capital and revenue — was vested in the fiduciary legatees, as such, to administer and hold indefinitely, or as long as the law will permit; so that, on the death of the testator, they were seized alone of the property, rights and actions of the deceased. Mr. Mignault's contention at the argument here was that, by reason of the division which the fiduciary legatees are directed by the testator to make, each child became entitled, as the institute to a substitution, to that share in the estate which was then assigned to him. In other words, according to this argument, the effect of that partition would be to create a substitution with respect to each share of the estate. I can find no

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words in the will to justify such a conclusion. To create a fiduciary substitution is to vest a title in the institute who holds the property as proprietor. Where is the provision in the will which enables the legatees to part with any share in the capital of the estate for any such purposes ? When speaking of the partition of the estate, here are the words which the testator uses:—

Et quant aux biens meubles, etc. * * * je veux et entends qu'il en soit fait autant de parts égales que j'aurai d'enfants au temps de mon décès nés de mon mariage avec ma dite épouse, *pour chacune de ces parts ou portions de mes biens représenter les biens mobiliers et immobilies dont chacun de mes dits enfants aura seulement la moitié des revenus, sa vie durant.*

How can it be said that a partition of the estate, made for a purpose so clearly expressed in the underlined words, could be construed as divesting the legatees, or vesting the children ? Moreover, it is to be observed that, after having disposed of his estate in favour of the legatees, the testator proceeds to say what is to be done with the revenues after this division. I quote his words:—

Je veux et entends qu'après dix ans du jour de mon décès, il soit fait *délivrance* tous les ans, à mes dits enfants, alors majeurs, et à ceux qui seront mineurs, à compter de leur majorité, et ce, leur vie durant, de moitié des revenus, rentes, loyers et intérêts (toutes dépenses préalablement déduites) de tous les biens mobiliers et immobiliers qui, composeront le lot de chacun d'eux, mes dits enfants, d'après le partage qui aura été fait de mes biens en autant de parts égales que j'aurai d'enfants lors de mon décès, ainsi que ci-dessus pourvus, et aussi de moitié des revenus, loyers et intérêts (aussi toutes dépenses préalablement déduites) de tous les biens mobiliers et immobiliers qui, auront été acquis par mes dits fidéi-commissaires, remplaçants ou successeurs, avec les revenus, rentes, loyers et intérêts annuels qui auront été retirés et employés par eux pendant les dix ans du jour de mon décès et de ceux qui seront acquis du vivant de mes dits enfants par eux, les dits fidéi-commissaires, remplaçants ou successeurs, avec l'autre moitié des revenus, rentes, loyers et intérêts annuels des biens de ma dite succession et qui doivent rester à la

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disposition de ces derniers, pour en être fait emploi ainsi que susdit, *pourvu et à condition toutefois que la moitié des dits revenus,* rentes, loyers et intérêts dont délivrance doive être faites à mes dits enfants comme susdit, *ne donnent pas moins de cinq cents livres,* cours actuels, à chacun d'eux, mes dits enfants, par chaque année.

This disposition clearly contemplates acquisition of property and additions to the estate, subsequent to the partition, and also creates an obligation on the trustees in favour of the children, each of whom is entitled to receive out of the revenues of the estate at least £500 currency. That is to say, each child at the expiration of the lean period of ten years is a creditor of the estate for at least £500, whatever may be the revenues, and although a partition may have been made in the meantime. They have no title in the estate, nor have they any claim to any partition of the revenues, but they are creditors to the extent of their annual allowance, which must be taken out of capital if the revenues are insufficient. This is wholly inconsistent with the idea of a final division of the estate. Read with all the other clauses of the will, I fail to see how it can be successfully argued that this partition is final, or intended for any other purpose of the will, I fail to see how it can be successfully argued that this partition is final or intended for any other purpose than to give the children a sentimental interest in the estate of their father, which was being administered for them and their children by strangers. Their claim to a share of the revenues was only for life and, as I have already said, they and their descendants had no share in the management, except as possible members of the board of legatees. The will is explicit as to this. After providing for the appointment of new legatees in cases of vacancy caused by death or resignation, the testator says

pourvu et à condition que ceux de mes enfants et descendants mâles qui seront jugés être capables, qualifiés et compétents à remplir cette charge y soient choisis et nommés de préférence à toutes autres personnes.

This is one of the many provisions which one does not expect to find in a will creating a substitution.

It is quite true that the word substitution is used in many places in the will, but the rule is that:—

In general, the whole tenor of the act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptation of particular words in order to determine whether there is substitution or not. Art. 928 C.C.

In his comment on art. 964 C.C., Sir François Langelier gives very clearly the distinction between substitution and fiduciary legateeship. He says:—

Pour qu'il y ait une vraie substitution, il faut donc que les biens *soient donnés en propriété* à quelqu'un pour lui-même, avec charge de les restituer à un autre, et il n'y a pas de substitution lorsqu'il est évident que le testateur n'a pas légué les biens à son légataire pour celui-ci, mais ne s'est servi de lui que comme d'un instrument, ou d'un intermédiaire, pour faire parvenir ces biens à une autre personne.

On the whole, I am of the opinion that the share of Louis Masson is to be distributed among the children of the testator and their descendants in the same way and subject to the same conditions as if Louis Masson had pre-deceased the testator and the estate of the latter had been divided originally in seven instead of eight shares, the ninth share having been made for a special purpose. To make my meaning clear, I hold that the share of Louis Masson goes to increase share No. 9, so as to be dealt with by the fiduciary legatees in the same way, that is as if no disposition had been made of it by them or, to repeat myself, as if there never had been a share No. 2, and that all it contained formed part of share No. 9.

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By adopting practically the same construction of the will as the Chief Justice in the court below, I reach a different conclusion because he deals with the share in question as if it was really substituted, in which case the appellant's father and grandfather having pre-deceased the institute, Louis Masson, he, the appellant, would only be the second degree in the substitution; and the property might be substituted to the fourth or fifth generation. Whereas, on my construction, there never was a substitution and the share must be dealt with on the assumption that the testator intended his property to vest in his fiduciary legatees under an obligation on their part to hand it over to his descendants when they would be entitled to receive it, if by his will he had created a substitution. In this way, the property reaches the third generation, but does not go beyond, and the law against perpetuities is not defeated.

DAVIES J.—The questions to be determined upon this appeal depend entirely upon the proper construction of the will of the late Honourable Joseph Masson, made in 1847.

I agree with Chief Justice Fitzpatrick that, by his will,

> the testator did not create any substitution in favour of his children and their children, and failing the latter, in favour of the brothers and sisters reciprocally.

There is not a word in the will from beginning to end suggesting a substitution in the collateral line. Where in the will substitution is mentioned, it is in the direct line from descendants to descendants. Nowhere is reference made to collaterals.

A great deal of argument was addressed to us as to

the intention of the testator to keep his property in his family, but, while that intention is clearly expressed so far as direct descendants of each of his children exist, I have not been able to find a word shewing any intention on the part of the testator, in the event of there being a failure of descendants of any one of his children, to deal with the share of the child so dying in any way.

My construction, therefore, of the will is that whenever any child of the testator died without leaving issue, the share of that child lapsed, and as to it there was an intestacy.

When, therefore, the late Louis Masson died without leaving any issue, his share of the estate remained vested in the trustees for the benefit of, and to be distributed amongst the heirs of the testator living at the time of Louis Masson's death.

The simple fact is, as I construe the will, that the testator made no provision whatever for the share allotted to any one of his children in the event of such child dying without issue. That there was no collateral substitution seems to be the opinion of the majority of this court, and I cannot escape from the conclusion that in such case, where special and elaborate provision is made by the will for the enjoyment by each of the children of the testator during his or her lifetime, and by such child's issue afterwards, "indefinitely or as far as allowed by law," and no provision whatever is made for the contingency of a child dying without issue, if and when such a contingency happens, there arises an intestacy as regards such share.

In the case before us such a contingency has occurred; Louis Masson, one of the testator's children, has

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died without issue, and in my judgment there has been an intestacy as to his share.

I would, therefore, allow the appeal in part, refer the case back to the Superior Court to deal with this share of Louis Masson in the estate on the basis of there having been an intestacy with regard to it when he died.

DUFF J.—I concur in the opinion stated by the Chief Justice.

ANGLIN J.—Upon the pleadings it is the common case of all the parties represented on this appeal that on a proper construction of the will of the late Honourable Joseph Masson he created a substitution of his entire estate or a substitution of each of the eight shares into which he directed that his estate should, for certain purposes, be divided. The learned judges in the Superior Court and in the court of appeal, probably because the case was so submitted by all parties, have proceeded on the assumption that the will provides for substitution. The same view appears to have been taken by Pagnuelo J. in *Perrault* v. *Masson*(1), but was not accepted, as I read their opinions, by Loranger J. in *Taschereau* v. *Masson*(2), or by Jetté J. in *Masson* v. *Masson* (28th June, 1889).

The present contest concerns the aliquot share of the estate of which Louis Masson, a son of the testator who died without issue, had enjoyed one-half of the income, and the one-eighth interest in a ninth lot, held undivided for reasons of convenience, of which he also had received one-half of the income.

(1) Q.R. 15 S.C. 166. (2) M.L.R. 7 S.C. 207.

The plaintiff, Léopold Masson, claims that as a great-grandchild of the testator he takes an interest in this property as a second substitute and, therefore, as absolute owner (art. 932 C.C.). The grandfather and father of Léopold Masson both predeceased Louis Masson. He, therefore, acquired whatever interest he may have (if any) in the property in question immediately on the death of Louis Masson without any intervening interest having vested in either his grandfather or his father. He was, nevertheless, held by the learned trial judge to be absolute and unconditional owner of the property which he here claims, probably as a second substitute, although the learned judge does not say so. In the Court of King's Bench he was held to be the first substitute in respect of such property and merely entitled for life to the revenues which it produces and bound to deliver over the corpus to his children. From this part of the judgment the plaintiff appeals to this court.

On the assumption that a substitution was created, which the testator directed should subsist "indefinitely or as long as permitted by law," and that a collateral or subsidiary substitution may be implied, I should respectfully concur in the conclusion reached by the court of appeal in regard to the plaintiff's interest here in question.

The defendant Dame Marguerite Masson (Mrs. Burroughs), who is a grand-daughter of the testator and the daughter of Honourable L. F. R. Masson, who survived his brother Louis, also asserts that an interest in the property which had been set aside as the source of income for Louis Masson and his children is now vested in her as a second substitute, her father

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having been, she alleges, the first substitute in respect of such property. She, therefore, claims it as absolute owner. On the other hand, the defendant-executors and the plaintiff insist that on the death of Louis Masson, who they say was seized as an institute, his surviving brothers and sisters acquired his interest in their father's estate by accretion; that the seizin of Honourable L. F. R. Masson of his share in that interest was not as a substitute, but as an institute; and that his daughter, therefore, holds not as second, but as first substitute. This latter view prevailed in the Superior Court. But Dame Marguerite Masson succeeded in convincing a majority of the learned judges in the court of appeal that her contention was well founded. Against the judgment declaring her to be entitled as absolute and unconditional owner of the interest which she claims, the executors and Léopold Masson have appealed. If the will of the Honourable Joseph Masson had created a substitution in favour of the descendants and also a collateral or subsidiary substitution under which a one-seventh interest in the share of which his brother Louis would in that case have been institute and *grevé,* passed to the Honourable L. F. R. Masson, and on his death to his children, I should incline to the view that the judgment in appeal must be maintained. *Jones* v. *Cuthbert*(1); 8 Pothier, "Des Substitutions," No. 224, p. 533.

If, however, the testator created a substitution, and if, in respect of the share of which he had the income, Louis Masson was an institute *grevé de substitution,* the only substitution provided for is in favour of his descendants. There is no direction for subsidiary substitution in favour of collaterals, and I am respect-

(1) M.L.R. 2 Q.B. 44.

fully of the opinion that none may be implied. Thévenot D'Essaule (Mathieu), No. 262, p. 98. The obligation to deliver the substituted property does not exist, where the condition upon which that obligation is to arise has not been fulfilled. The institute in that case is discharged from the obligation. He holds with an absolute title. On Louis Masson's death, therefore, if he held as institute under a substitution, his heirs, in default of testamentary disposition by him, took an absolute title to his share.

But with great diffidence, due to the fact that all the parties have treated the case as one of substitution and that the provincial courts have accepted that view of it, after a very careful study of the will of the late Honourable Joseph Masson, I have become convinced that he did not create either a single substitution or several substitutions of his property. He vests his entire estate (*je donne et lègue*) in his testamentary executors *à titre de fidéi-commis*. (I incline to agree with Mr. Mignault that had he said *à titre de fiducie* his language would have been more exact. But see 11 Baudry-Lacantinerie, No. 3050. To his children and grandchildren he gives no interest whatever in any part of his property. The sole right of his children is to receive from his executors and trustees one-half of the income derived from the several lots into which he directed that his estate should for that purpose be divided. Even this limited right he postpones until ten years after his decease. That his children should have no interest in any part of the corpus of the estate, but merely a right to receive defined portions of its revenues as alimentary allowances he makes abundantly clear. The rights conferred on the grandchildren are precisely the same, except that they ex-

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tend to the whole revenue. The intention of the testator that the entire title to and control of his property should be vested in his *fidéi-commissaires,* and that his children and grandchildren should have no rights except to demand and enforce payment to themselves by the fiduciary legatees of the revenues which the testator directed they should receive is too clearly expressed to admit of the slightest doubt and, in my opinion, makes the existence of any substitution impossible.

It is of the essence of a substitution that the institute should hold the property as proprietor. Art. 944 C.C.

> L'héritier, ou autre grevé de substitution est, avant l'ouverture, seul propriétaire des biens substitués.
>
> Le grevé de substitution étant, avant l'ouverture de la substitution, le vrai et seul propriétaire des biens substitués, il suit de la que les actions actives et passives de la succession résident en sa seule personne: *ipsi et in ipsum competunt.*

Pothier gives this as the first principle of a substitution and its corollary, "Des Substitutions," 153-4.

Neither the children nor the grandchildren of the testator ever became in any sense proprietors of the property of which it is claimed there is substitution. They never were *grevés* in respect of it. It is not the subject of the two or more *libéralités* which must be found in every *substitution fidéi-commissaire.* 11 Baudry-Lacantinerie, No. 3065.

It is no doubt true that the testator speaks of the disposition which he had made as a substitution. He so refers to it many times in the course of his will—sometimes as a substitution of revenues and again as a substitution of property. Indeed, it seems clear that he was under the impression that it was properly designated as a substitution. But his mistaken idea that

the disposition which he actually made might with propriety be called a substitution does not make it such.

Bien entendu qu'il doit y avoir des termes dispositifs et non pas simplement énonciatifs.

Ce ne serait pas assez, par exemple, qu'un testator eût parlé dans son codicile, d'une substitution par lui faite dans son testament, s'il n'y avait, ni dans le testament, ni dans le codicile, des termes emportant disposition présente et actuelle. Thévenot D'Essaule, para. 180, ed. annoté par M. Mathieu, p. 62.

Pressed by the difficulties arising from the absence from the will of any words vesting the corpus of the estate in the testator's children or grandchildren and the presence of directions incompatible with either the children or the grandchildren having any title to, or any control of, any part of the testator's property, Mr. Mignault invoked the provisions directing partition as necessarily implying that, upon the executors making the division directed, title to the share allocated to him as a source of revenue would vest in each child as institute subject to the obligation of transmitting it to his descendants in due course. But the testator in directing this division has been careful to state that its purpose is to enable his children and their descendants to know the particular properties from which their revenues are derived and that the parts or portions are to *represent* the property of which each shall enjoy the income. I find nothing in such a division which would have the effect of divesting the fiduciary legatees and vesting the property in the testator's children and grandchildren, notwithstanding the express directions elsewhere given that they are merely to receive, and that it shall be the duty of the fiduciary legatees to pay, during their respective lives, to each of the former one-half and to each of the latter the

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whole of the revenue derived from the particular parts of the estate allocated for that purpose, but held, managed and administered by the fiduciary legatees. The original division and the subsequent sub-divisions are ordered solely for the purpose of ear-marking the sources of the revenue which is to be paid to each member of each branch of the family. Although when made they should be final and unchangeable (many considerations support the view that they should be so held), they have not, in my opinion, the effect for which the respondent contends. Notwithstanding the division and sub-divisions, the title to the entire succession as a single entity remained in the fiduciary legatees with the result that on the failure, through his death without issue, of the charge in favour of the chiildren of Louis Masson and their descendants the reason for maintaining the identity of the share allocated to that branch of the testator's family ceased and the part of the estate or *hereditas* in the hands of the fiduciary legatees from which Louis Masson had derived his income became available to satisfy the charges in favour of the other branches of the family imposed by the testator upon his succession. If the testator intended a bequest to Louis's more remote descendants of the property from which Louis had derived his revenue, or if such a bequest would be the legal result of his dispositions, that bequest simply lapsed. The direction to divide the estate into equal aliquot shares would not prevent the accretion (if that be the correct term to apply) of the aliquot part assigned as a source of revenue for Louis to the mass of the estate for the benefit of the ultimate legatees of the corpus (art. 868 C.C.). On the death of Louis Masson without issue, unless we are to assume that

as to the share allocated to his branch of the family the testator was in that event intestate, which seems contrary to the spirit, if not to the letter, of art. 868 C.C., and to the scheme of his will as a whole and would defeat his apparent object, namely, to keep his property as long as possible in his family, that share remained in the mass from which it had not been separated except for the identification of the revenues derived from it. It augmented the corpus available for the other branches of the family and, as an incident, the revenues derived from that corpus were also increased. The share of each of the other branches of the testator's family was augmented by one-seventh of the share which it had become unnecessary to hold for the descendants of Louis. Such one-seventh as an accretion or accession was absorbed in the share which it thus augmented and became subject to the provisions of the will applicable to that share and must, I think, be dealt with and disposed of, both as to corpus and revenue, as an integral part of such share.

It being clear that neither a substitution nor a series of substitutions had been created, we have a devise of the testator's entire estate to fiduciary legatees, the only trust declared being that they shall manage the property, collect the revenues and pay them to the testator's children, grandchildren and their descendants, indefinitely or as long as the law will permit.

It has been suggested that the testator has himself indicated that this *fiducie* or trust is to be subject, as to its duration, to the rules which govern substitutions—that this intention is to be gathered from his

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repeated references to substitution. I am, with respect, unable to concur in this view.

I think there is no doubt that the testator was under the impression that his bequests were, or partook of the nature of, substitutions. He very probably thought that they would, therefore, be subject to the restrictions imposed by law on that form of disposition, and he may have had in mind the limitation now enunciated in art. 932 C.C., but not then so certain or well defined, when he directed that the revenues of each share of his estate should pass from his children to their descendants *indéfiniment, ou autant que permis par la loi,* and provided for succession in the trusteeship, for tutorships and for payment of such revenues to his children, grandchildren and great-grandchildren (see clause No. 3 providing for receipts to be given by married women) "as long as the substitution hereby created shall last." But his expressed intention is that his fiduciary legatees shall hold the property and shall pay its revenues to his descendants perpetually (*indéfiniment*) unless the law prevents that being done. I do not read the references to substitution in the will as indicating that the testator intended that, although his dispositions should not in fact be substitutions, or be so much in the nature of substitutions as to be subject to the provisions of the law now embodied in art. 932 C.C., but should constitute a *fiducie* or trust in favour of his children and their descendants, the rules and restrictions which govern substitutions should, nevertheless, apply to the administration and duration of the *fiducie* or trust thus created. On the contrary, the words *et ce indéfiniment, ou autant que permis par la loi* seem to me to make it clear that he intended

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that the duration of the *fidéi-commis,* as he styles it, which he created should be subject only to such legal restrictions (if any) as such a disposition of property could not escape.

We have, therefore, to deal with a disposition in the nature of a trust of property intended by the testator to be perpetual if the law will permit, and, if not, to endure as long as the law will allow, with a provision for a succession of trustees for the expressed purpose of ensuring the enjoyment of the revenues of his succession by the testator's descendants to the most remote degree possible and with the manifest intention that, if and when the law requires that such a trust shall come to an end, the testator's descendants shall receive the corpus of his property in the shares which he has indicated. That the ultimate beneficial ownership of the property is in that case devised to persons not *in esse,* does not invalidate the disposition, because, by virtue of art. 838 C.C., the capacity to receive is, in the case of suspended legacies, to be considered relatively to the time when the right comes into effect. That the fiduciary legatees can never become entitled to any part of the testator's property except the compensation which he has fixed for their services is unquestionable (art. 964 C.C.). The purpose of the testator was that, as long as the law would permit, his fiduciary legatees should hold the corpus of his estate and should pay the revenues to his children and their descendants. Only when the legal limit had been reached did he wish the corpus to pass from his trustees, and then, clearly, not as on an intestacy, but under his will to those whom he intends to benefit as his legatees — the most remote of his descendants for whom the law

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will allow him to require that his property shall be held, if it may not, under the law, be held by his trustees indefinitely for the purpose of providing a perpetual revenue for his descendants.

Such being the testator's intention, and that intention being supreme within legal limits, it becomes necessary to inquire what restriction, if any, the law imposes upon the duration of such a trust.

The policy of the law upon which the rule in regard to substitutions enunciated in art. 932 C.C. is based, would seem to require that a similar restriction should be placed upon such a *fiducie* or trust as that with which we are now dealing. By the application of such a rule the beneficiary who, if the duration of the trust were unlimited, would actually come into the enjoyment of a portion of the revenue after two other beneficiaries had successively received revenue derived from the same fund or property, would become the absolute owner of that part of such fund or property from which the portion of revenue, which he would otherwise enjoy, would be derived. Although to apply such a rule to *fiducies* or trusts without express statutory authority may savour of judicial legislation, it seems necessary to do so unless we are prepared to hold that the purpose of the limitation advisedly placed upon the duration of substitutions may be frustrated by the very obvious device of creating a *fiducie* or trust of property which is either perpetual or postpones beneficial ownership of the corpus for a period longer than is permitted under the law of substitutions.

Applying the rule which I have indicated, the plaintiff, Léopold Masson, on the death of his father, Joseph Edouard Masson, who survived his father

Isidore Candide Masson, a son of the testator, became entitled, as absolute owner of an interest in it, to a partition of the share allocated to the family of his grandfather. The defendant, Dame Marguerite Masson, on the other hand, as a daughter of the Honourable L. F. R. Masson, also a son of the testator, is only the second person to enjoy the revenue from the property, forming the part of the share allocated to her father's family, of which she receives the income. She is not entitled to that property as absolute owner.

The shares allocated to the respective families of Isidore Candide Masson and of Honourable L. F. R. Masson have each been augmented by one-seventh of the property which would have gone to the family of Louis had he left descendants. The property by which the original shares of the other branches of the family were augmented on the death of Louis without issue was simply absorbed in such shares. Had the grandfather and the father of Leopold Masson survived Louis, their respective incomes would have been accordingly increased. Assuming that Léopold Masson has already obtained, in full beneficial ownership, his interest in the property which originally constituted the share of his grandfather, Isidore Candide Masson, he is, in my opinion, entitled to the partition of the property in question in this action because his right to the interest which he claims in it is precisely the same as that by which he enjoys the ownership of a portion of the share originally allotted to the family of his grandfather. The accidental circumstance that this right accrued in respect of the property now in question after he had become entitled to his interest in the share of his grandfather's family as originally constituted, and

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without the revenue of such property having been received by his grandfather and his father, does not in my opinion affect it. It is as an integral part of the share of his branch of the family, which must be regarded as a single *lot,* that he is entitled to share in the property by which that *lot* has been augmented. On the other hand the claim of Dame Marguerite Masson must fail because she is not entitled to the absolute ownership of the portion of the share allocated to her father's family of the revenue of which she has been in receipt since his death. The ownership of the property by which that share or *lot* has been augmented will belong to those who may become entitled to the ownership of the *lot* or share itself.

I do not express any opinion upon the various rights, under the partition to which the plaintiff is held entitled, of the several parties as set forth in the declaration in this action. Those rights should be worked out in the provincial courts following the lines indicated in the judgment of this court, so far as it may be found proper at present to determine them.

The appeal should be allowed and the conclusions of the learned trial judge should be restored. In view of the very serious difficulties created by the peculiar and unusual dispositions of his property made by the testator the costs of all parties should come out of the estate.

BRODEUR, J. (dissident).—La première question qui se présente dans cette cause est de savoir si par son testament fait en 1847, peu de temps avant sa mort, l'honorable Joseph Masson a créé une substitution.

La clause principale du testament est la clause 4, qui se lit comme suit:—

Et *quant aux biens meubles et immeubles,* propres, acquêts et conquêts, argent monnayé et non monnayé, dettes actives, droits et actions mobiliers et immobiliers et tout ce que je délaisserai lors de mon décès, quelles qu'en soient la nature, consistance, qualité, valeur et situation, sans aucune exception ni réserve, *je veux et entends qu'il en soit fait autant de parts égales que j'aurai d'enfants* au temps de mon décès, nés de mon mariage avec ma dite épouse, pour chacune de ces parts ou portions de mes biens, représenter les biens mobiliers et immobiliers, dont chacun de mes dits enfants auront seulement la moitié des revenus, sa vie durante, ainsi que ci-après pourvu, et *pour les revenus de chacune de ces parts* ou portions de mes biens *être réversibles,* après le décès de chacun de mes dits enfants, *aux enfants nés en létigimes mariages d'eux,* mes dits enfants, respectivement et *être substitués de descendants en descendants, et ce indéfiniment, ou autant que permis par la loi,* en observant que *je veux et entends que lors de chaque succession ou transmission de mes biens, il en soit fait partage, autant que possible, entre chacun de mes descendants,* de manière à pouvoir connaître et distinguer la part ou portion des biens dont chacun d'eux aura les revenus, sa vie durant, le tout sous les clauses et conditions ci-après mentionnées.

Par la clause 5, il nomme certaines personnes ses exécuteurs testamentaires et fidéi-commissaires "pour faciliter," dit-il,

l'exécution de mes dispositions testamentaires et pour d'autant mieux garantir la réversion des revenus de mes biens à mes dits enfants et descendants suivant mes désirs ci-après exprimés,

et il pourvoit à ce qu'ils soient remplacés "tant et aussi long temps," dit-il, "que la substitution créée par mon présent testament subsistera," et il ajoute:—

Auxquels dits fidéi-commissaires, remplaçants ou successeurs *je donne et lègue à titre de fidéi-commis tous mes dits biens* meubles et immeubles, propres, acquêts et conquêts, argent monnayé et non monnayé, dettes actives, droits et actions mobiliers et immobiliers et tout ce que je délaisserai lors de mon décès, sans aucune réserve ni exception, *pour le tout être géré et administré,* les revenus, rentes, loyers et intérêts de mes dits biens mobiliers et immobiliers retirés et perçus, mes dettes actives réalisées et mes biens meubles et effets convertis en deniers par mes dits fidéi-commissaires, remplaçants, ou successeurs, et pour les deniers qui seront réalisés de ma suc-

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cession, après les affaires d'icelle liquidées et mes dettes payées, être employés avec les revenus de mes autres biens mobiliers et immobiliers en achats de propriétés foncières, en parts ou actions de banques, en fonds provinciaux ou publics, "débentures," ou de toute autre manière qui pourra être jugée avantageuse ou profitable, et pour les revenus, rentes, loyers et intérêts de toute ces biens ou emplois mobiliers et immobiliers être de temps à autre et autant que possible au fur et à la mésure qu'ils seront retirés et perçus convertis et employés de la même manière pendant et aussi longtemps qu'il sera nécessaire pour la plus grand avantage de mes dits enfants et descendants, et selon mes dispositions ci-dessus et celles ci-après mentionnées.

Il procède ensuite à exprimer dans six autres paragraphes ses dernières volontés. Au paragraphe deuxième il déclare que les revenus des enfants seront incessibles et insaisissables et qu'ils ne pourront être vendus

tant et aussi longtemps que la substitution créée par mon présent testament subsistera.

Au paragraphe troisième, il dit là encore

tant que la substitution créée par icelui (mon présent testament) subsistera.

L'avant dernier paragraphe de son testament se lit comme suit:

Je veux et entends que dans le cas où il serait nécessaire, pour mettre à exécution mes présentes dispositions, de faire nommer en justice un tuteur ou des tuteurs à la substitution et aux substitutions créées par mon présent testament, les personnes par moi nommées ci-dessus pour mes exécuteurs testamentaires et fidéi-commissaires, leurs remplaçants ou successeurs, soient, en autant que faire se peut, nommés ainsi tuteurs à la dite substitution ou aux dites substitutions et en nombre égal à celui que j'ai ci-dessus fixé pour mes dits exécuteurs et fidéi-commissaires.

Les uns prétendent que le testateur a créé une fiducie avec obligation de payer la moitié des revenus aux enfants et la totalité des revenus aux petits-enfant et de remettre le capital à ceux qui viondront en troisième lieu.

D'autres disent, au contraire, que le testament crée une substitution tout en donnant en même temps aux exécuteurs ou fidei-commissaires l'administration des biens et d'autres pouvoirs très étendus.

Dans les testaments nous devons toujours rechercher l'intention du testateur; et, même si parfois les textes semblaient énoncer un certain ordre d'idées, nous devons cependant examiner l'ensemble du document pour rechercher d'une manière exacte ce que le testateur a eu le désir et la volonté de faire avec ses biens.

Il me paraît évident que dans le cas actuel M. Masson, tout en créant une substitution, n'a pas voulu confier aux grevés, ses enfants et ses petits-enfants, l'administration et la jouissance complète de ses biens; mais son désir est assez formellement exprimé dans les extraits que je viens de faire de son testament pour démontrer que sa volonté était qu'il y aurait substitution de ses biens. Il n'a jamais voulu considérer ses executeurs testamentaires comme bénéficiaires; mais il a voulu que ses descendants jouissent de sa fortune.

Sachant que la loi permet de nommer des exécuteurs testamentaires avec des pouvoirs de vendre, de disposer et d'aliéner, il a voulu se choisir des administrateurs qui conserveraient aussi loin que possible parmi les membres de sa famille les biens qu'il avait amassés.

La substitution n'est pas subordonnée à la fiducie. Ce n'est pas celle-ci qui doit dominer. C'est au contraire la substitution qui prévaut et les exécuteurs testamentaires ne sont là que pour sauvegarder les intérêts des grevés qui sont les seuls vrais intéressés.

La question de savoir si ce testament créait une

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substitution a été décidée par l'honorable juge Loranger dans la cause de *Taschereau* v. *Masson*(1), et par l'honorable juge Pagnuelo dans la cause de *Perrault* v. *Masson,* en 1898(2).

Dans ces deux causes, ainsi que dans la cause actuelle, les exécuteurs testamentaires étaient partie au procès et ont reconnu qu'il y avait substitution. Décider le contraire serait bouleverser toute l'administration de cette succession et amener des complications des plus sérieuses. Il vaut mieux respecter l'intention évidente du testateur et maintenir l'interprétation que les exécuteurs, dans les soixante dernières années, ont faite de ce testament. Il est bon de remarquer que parmi ces administrateurs se trouvaient des amis intimes du défunt et quelques-uns de ses enfants, qui devaient connaître les idées du *de cujus.*

Dans une cause jugée par l'honorable juge Jetté, en 1889, qui n'est pas rapportée, une action avait été prise par l'un des neveux de Louis Masson pour faire déclarer que la part de ce dernier appartenait à ses héritiers légitimes, vu que la substitution s'était ouverte par sa mort sans enfants.

Le savant magistrat a décidé que le testament constituait une fiducie limitée par le testateur aux degrés permis dans le substitution et que les biens confiés par le testateur à ses légataires fiduciaires ne pourraient être remis qu'aux arrière-petits-enfants. Il ajoutait cependant le considérant suivant qui démontre l'incertitude dans laquelle il se trouvait:—

Considérant en outre que même en appréciant le testament du dit Joseph Masson comme ne créant *qu'une simple substitution,* il en résulte encore que l'intention du testateur a été de faire parvenir à

(1) M.L.R. 7 S.C. 207. (2) Q.R. 15 S.C. 166.

tout événement les biens composant sa succession à son décès et ceux à acquérir avec la moitié des revenus accumulés à ses arrière-petits-enfants et de ne laisser à ses enfants et petits-enfants qu'une moitié des revenus.

Il est bien évident par cette citation que le jugement ne va pas aussi loin qu'on le dit. Il n'était pas nécessaire, d'ailleurs, dans cette cause, de décider ce point. Il suffisait de démontrer que la part de Louis Masson, qu'il y aît substitution ou non, doit, suivant les dispositions du testament, passer aux enfants du testateur et non pas aux héritiers de Louis Masson.

On peut donc conclure qu'il y a eu unanimité presque complète chez les magistrats, chez les administrateurs, et chez les héritiers pour reconnaître qu'il y a substitution.

Je croirais que ce serait une profonde erreur de modifier l'interprétation qui a été faite et qui constitue, sinon chose jugée, du moins un contrat judiciaire que nous devrions reconnaître.

Pothier, dans son "Traité des Substitutions," No. 45, dit:—

Comme c'est la volonté qui forme la substitution fidéi-commissaire, quoiqu'elle ne soit pas exprimée, il suffit qu'on puisse tirer des conséquences de ce qui est contenu au testament, que le testateur a eu effectivement volonté de la faire, pour que la substitution soit aussi valable que si elle était exprimée.

La substitution de la part de Louis Masson, est-elle devenue ouverte par son décès ?

J'aurais été enclin à répondre "oui" à cette question.

Sa part aurait passé à ses heritiers légaux et serait devenue leur propriété à toutes fins que de droit. Lors de l'argument, j'ai suggéré cette hypothèse aux parties. Mais ni les appelants ni les intimés n'ont voulu prendre cette position.

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L'intimée aurait eu apparemment intérêt à soutenir cette prétention. Mais elle a préféré s'en tenir aux termes de son plaidoyes, c'est-à-dire, que les revenus de la part de Louis Masson sont réversibles aux descendants du testateur.

Les appelés à la substitution ont intérêt, eux à ce que la plus grande somme de biens leur échoit, maintenant si les héritiers, comme Mde. Burroughs, qui auraient pu jouir de la part de Louis Masson comme héritiers, ne désirent pas prendre cette qualité mais préfèrent, au contraire, considérer cette part comme substituée et n'être eux-mêmes que des grevés ou des appelés de cette part, cela constitue de la part des interessés une admission qui a toute la force d'un contrat judiciaire et que les tibunaux doivent accepter.

La part de Louis Masson reste donc soumise aux dispositions du testament et nous devons la traiter comme étant substituée.

Qui devait recueillir la part de Louis à sa mort du moment que le substitution n'était pas ouverte ? Ce sont les descendants du testateur. Le testateur déclare en effet que son désir est de voir ses biens rester dans sa famille, et il ajoute que lors de chaque succession ou transmission de ses biens il veut qu'il en soit fait partage autant que possible entre chacun de *ses descendants*.

Que signifie là le mot descendants ? Veut-il dire tous les enfants, petits-enfants, arrière-petits-enfants du testateur ? Non. Pothier, dans son "Traité des Substitutions," No. 77 (ed. Bugnet, vol. 8, p. 480), discute l'interprétation qui doit être donnée au mot "famille" quand il se rencontre ainsi dans un testament et il termine en disant:

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Lors de l'ouverture de la substitution à laquelle une famille est appelée, ce ne sont pas indistinctement tous ceux de la famille qui doivent la recueillir. Si l'auteur de la substitution a prescrit lui-même l'ordre dans lequel elle serait recueillie, et nommé ceux qu'il entendait préférer aux autres, on doit suivre ce qu'il a ordonné, sinon ce sont ceux de la famille qui sont en plus proche degré, qui doivent la recueillir.

Ayant disposé du point qui avait soulevé dans mon esprit, au moins, un doute très sérieux, sinon une conviction, j'ai maintenant à considérer si à la mort de Louis Masson sa part est accrue à ses frères et neveux; ou bien si la transmission a créé un degré dans la jouissance de sa part. S'il y a eu accroissement, alors les frères et neveux de Louis Masson jouissent de sa part comme grevés au premier degré. Si, au contraire, il y a eu transmission de Louis à ses frères et neveux, alors ces derniers jouiront des biens comme grevés au deuxième degré et leurs héritiers seront alors les appelés définitifs de cette part; l'intimée, Madame Marguerite Masson, qui est l'une des enfants de l'honorable Rodrigue Masson, aura alors, avec ses frères et sœurs, la jouissance absolue de la partie des biens de Louis Masson qui est échue à leur père.

DROIT D'ACCROISSEMENT.

L'accroissement est le privilège qu'une personne possède de jouir de toute la chose léguée dans le cas où son colégataire ne recueille.

Ainsi A. donne une propriété à B. et C.; C. décède ou bien refuse de se porter acquéreur; alors B. a le droit de prendre toute la propriété.

Mais si C. accepte le legs, entre en possession ou jouisse de la moitié de la propriété, et qu'il meure ensuite sans disposer de ses droits, alors ses représentants recueilleront la moitié de la propriété; et si

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ce représentant était son co-légataire alors ce dernier deviendra l'acquéreur de toute la propriété non pas comme légataire de A. mais comme légataire de A. pour la moitié et comme héritier de C. pour l'autre moitié. Si la propriété avait été substituée alors B. serait grevé au premier degré de la moitié, c'est-à-dire, de celle qu'il aurait eu directement du testateur et grevé au second degré de la moitié qui lui aurait été transmise par C.

C'est, je crois, la position qui se présente dans le cas du testament de M. Joseph Masson quant à la part de Louis Masson. Si ce dernier était mort avant son père, évidemment ses sept frères et sœurs auraient pris la partie que M. Masson, père, lui destinait. Il y aurait eu accroissement. Il en aurait été de même si Louis Masson avait refusé d'accepter le legs.

Mais il a accepté le legs; alors il n'y a pas, d'après les dispositions de la loi, accroissement. Mais, dit-on, le testateur avait le droit de déclarer qu'il y aurait accroissement en faveur de ses descendants si l'un de ses enfants venait à mourir.

Incontestablement il avait le droit de déclarer, dans son testament, qu'advenant le décès d'un de ses enfants, sa part retournerait à ses frères et sœurs. Mais alors cette transmission constitue un degré dans la jouissance des biens substitués.

Le testateur dans une substitution n'a pas le droit de substituer plus loin que deux degrés. La loi ne veut pas permettre que des biens soient infiniment soumis à la volonté d'un testateur. Pas de substitution perpétuelle. Elles existaient autrefois; mais depuis l'ordonnance d'Orléans, en 1560, qui a été confirmée plus tard par l'ordonnance de Moulins, en 1566, elles sont abolies et on n'a permis au testateur d'exer-

cer une maîtrise sur ses biens que pour deux générations; ou, ce qui est plus exact, pour deux degrés de transmission. Le premier qui reçoit les biens peut avoir reçu ordre du testateur de transmettre ses biens à un autre et ce dernier peut avoir reçu aussi les mêmes instructions; mais quant au troisième qui recueillera les biens il est libre d'en disposer comme il l'entendra, que le testateur l'ait voulu ou non. Cette disposition est d'ordre public et le testateur ne saurait y contrevenir. Toute disposition contraire dans un testament serait nulle.

Asini un testateur pourrait bien pourvoir à ce que ses co-héritiers héritent les uns des autres; mais en établissant cet ordre successif il n'aurait pas le droit d'empêcher le troisième qui recueillera les biens d'en devenir le propriétaire absolu. M. Masson, en créant une substitution, pouvait créer Louis Masson premier grevé et lui ordonner de transmettre sa part à ses frères et sœurs; mais ces derniers, en recueillant cette part, n'en jouiront pas comme premiers grevés mais comme grevés au second degré et leurs enfants alors en deviendront les propriétaires absolus.

Pothier, au "Traité des Substitutions," vol. 8, page 470, (ed., Bugnet,) No. 50, nous donne un exemple qui, tiré de la jurisprudence romaine, a beaucoup d'analogie avec le cas qui nous occupe. Voici ce qu'il dit:—

Un héritage avait été donné à deux légataires, et le survivant avait été chargé de le restituer à un tiers * * * Paul décide qu'on doit supposer un premier degré de substitution tacite par lequel le prédécédé aît été chargé de restituer, lorsqu'il mourrait, sa part dans la chose léguée au survivant. Cela est conforme à nos principes; le survivant étant seul chargé de restituer au tiers non-seulement la portion qu'il avait dans l'héritage, mais l'héritage entier, il est nécessaire qu'il aît reçu du testateur l'héritage entier, car autrement il ne pourrait être chargé de le restituer; *cum nemo fidécommisso onerari possit, in plus quam accepit;* or, il ne peut avoir reçu du testateur l'héritage entier qu'en supposant un premier degré de substitution, par lequel son colégataire prédécédé avait été chargé de lui

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restituer sa portion; il est donc nécessaire de supposer ce premier degré de substitution quoiqu'il n'aît pas été exprimé.

Appliquant les principes énoncés dans cet exemple à notre cas, nous voyons d'abord des colégataires. Ils constituent le premier degré de la substitution pour leur part respective. L'un d'eux meurt. Sa part qui passe entre les mains des survivants qui en deviennent les grevés au deuxième degré.

L'honorable Rodrigue Masson, par la mort du testateur, est devenu grevé au premier degré de la part qu'il a eue de son père. Mais pour la part qui autrefois était à son frère il en est devenu le grevé au second degré. Alors ses enfants, parmi lesquels se trouve l'intimée, Dame Marguerite Masson, deviennent les propriétaires définitifs de la part de Louis.

Je suis donc venu à la conclusion que le testament de M. Masson crée une substitution et, qu'en supposant même qu'il n'y aurait pas de substitution directe, il a été constitué une fiducie limitée par le testateur aux degrés permis dans les substitutions. Dans les deux cas, les deux degrés, pour la part de Louis, sont éteints et Madame Marguerite Masson, et ses frères et sœurs qui viennent en troisième lieu, ont droit de jouir de cette part en toute propriété. Pour la part qui vient directement de leur père et de leur grand-père ils sont cependant grevés au deuxième degré.

Je suis donc d'opinion de renvoyer l'appel avec dépens.

Appeal allowed with costs.

Solicitors for the appellant, Léopold Masson:
Augers, deLorimier & Godin.

Solicitors for the appellants, Henri Masson *et al*:
Bastien, Bergeron, Cousineau & Jasmin.

Solicitor for the respondents: *P. B. Mignault.*