

4, 1939

# In the Privy Council

32 1938  
No. 1356 of 1937.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE  
PROVINCE OF QUEBEC (APPEAL SIDE)  
CANADA

BETWEEN:

## Dame Diana Meredith et al.,

wife of Marcel Provost, of Cancorneau in the Department of Finistere in the Republic of France; DAME MARGARET M. RAMSAY, wife of Charles Chambers in the City of Toronto, in the Province of Ontario, Canada; DAME CONSTANCE M. RAMSAY, wife of Jessup Carley of the said City of Toronto; ALEXANDER M. RAMSAY of the said City of Toronto, stockbroker; WILLIAM M. RAMSAY, of the City of Calgary in the Province of Alberta; and DAME ELIZABETH M. RAMSAY, wife of George Cumpston of the said City of Toronto;

(Plaintiffs in the Superior Court and Appellants in the Court of King's Bench)  
**APPELLANTS**

and

## Dame Elizabeth Magdalene Meredith et al.,

of the said City of Toronto, widow of the late James David Thorburn in his lifetime also of the said City of Toronto; DAME CONSTANCE M. R. MEREDITH of the City of Brussels in the Kingdom of Belgium, widow of the late George Armstrong Peters in his lifetime of the said City of Toronto; MISS MARY MEREDITH, spinster, of the City of London in the Province of Ontario; THE ROYAL TRUST COMPANY, es-qualite, administrator of the Estate of the late EDMUND MEREDITH, JUNIOR, in his lifetime of the City of London, in the Province of Ontario; JOHN STANLEY MEREDITH of the City of London in the Province of Ontario, Gentleman, and THOMAS REDMOND MEREDITH of the City of London, in the Province of Ontario, Gentleman,

(Defendants in the Superior Court and Respondents in the Court of King's Bench)  
**RESPONDENTS**

## RECORD OF PROCEEDINGS

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# In the Privy Council

No. ~~1556~~<sup>32</sup> of ~~1937~~<sup>1938</sup>.

## ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE) CANADA

BETWEEN:

### 10 Dame Diana Meredith et al.,

wife of Marcel Provost, of Cancorneau in the Department of Finistere in the Republic of France; DAME MARGARET M. RAMSAY, wife of Charles Chambers in the City of Toronto, in the Province of Ontario, Canada; DAME CONSTANCE M. RAMSAY, wife of Jessup Carley of the said City of Toronto; ALEXANDER M. RAMSAY of the said City of Toronto, stockbroker; WILLIAM M. RAMSAY, of the City of Calgary in the Province of Alberta; and DAME ELIZABETH M. RAMSAY, wife of George Cumpston of the said City of Toronto;

(Plaintiffs in the Superior Court and Appellants in the Court of King's Bench)  
**APPELLANTS**

and

### 20 Dame Elizabeth Magdalene Meredith et al.,

of the said City of Toronto, widow of the late James David Thorburn in his lifetime also of the said City of Toronto; DAME CONSTANCE M. R. MEREDITH of the City of Brussels in the Kingdom of Belgium, widow of the late George Armstrong Peters in his lifetime of the said City of Toronto; MISS MARY MEREDITH, spinster, of the City of London in the Province of Ontario; THE ROYAL TRUST COMPANY, *es-qualite*, administrator of the Estate of the late EDMUND MEREDITH, JUNIOR, in his lifetime of the City of London, in the Province of Ontario; JOHN STANLEY MEREDITH of the City of London in the Province of Ontario, Gentleman, and THOMAS REDMOND MEREDITH of the City of London, in the Province of Ontario, Gentleman,

(Defendants in the Superior Court and Respondents in the Court of King's Bench)  
**RESPONDENTS**

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## RECORD OF PROCEEDINGS

No. 1

Joint Factum or Case for Decision of Question of Law upon Facts admitted;  
and the exhibits referred to therein.

40 In accordance with the provisions of article 509 of the Code of Civil Procedure, the parties hereto declare that they are in agreement as to the facts hereinafter set out, but are at variance upon the question of law arising therefrom, and desire to submit the said question for the decision of this Honourable Court.

The statement of facts agreed upon is as follows:

(1) The late Dame Elspeth Hudson Angus, in her lifetime of the City of Montreal in the Province of Quebec, widow of the late Charles Meredith in his lifetime of the same place, died on the 24th June, 1936, in the said City where she was domiciled.

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(2) At the time of her death, the estate of the late Dame Elspeth Hudson Angus (Mrs. Meredith) was of the gross value of about \$2,500,000.00, and was derived approximately as to one-half from the estate of her late father R. B. Angus, and one-half from the estate of her late husband Charles Meredith.

(3) She left as her last will and testament a holograph will, a photostat copy whereof is herewith produced and filed as exhibit No. 1 to form part hereof. 10

(4) This will was duly probated by judgment of the Prothonotary of the Superior Court for the District of Montreal, dated the 29th July, 1936.

(5) The fourth paragraph of the said will ended with the words:

“The rest of my estate to be divided equally between my brothers and sisters or their immediate heirs including my sister Edith’s family and between my husband Charles Meredith’s nieces and nephews (immediate heirs)”. 20

(6) The “brothers and sisters” of the late Mrs. Elspeth H. Meredith who survived her were: D. Forbes Angus, William F. Angus, D. James Angus, Dame Maud Angus, wife of Dr. W. W. Chipman, Dame Bertha Angus, widow of R. McD. Paterson, and Dame Margaret Angus, wife of Dr. C. F. Martin; and the said “my sister Edith” was the late Mrs. F. L. Wanklyn, who predeceased her sister, the late Mrs. Elspeth Meredith, and “my sister Edith’s family” who were expressly included are: David A. Wanklyn and Frederick Wanklyn the second, and Dame Gyneth Wanklyn, wife of Durie McLennan. 30

(7) The residuary estate of the said late Dame Elspeth H. Meredith was thereby divided into two equal halves, one of which halves was to be divided “between my husband’s Charles Meredith’s nieces and nephews (immediate heirs)”.

(8) The defendants Mrs. Thorburn, Mrs. Peters, Miss Mary Meredith, John Stanley Meredith and Thomas Redmond Meredith, with the late Edmund Meredith, Junior, were the only nieces and nephews of the said Charles Meredith who survived the said Dame Elspeth H. Meredith. 40

(9) There was no brother or sister of the said late Charles Meredith who survived his said widow the late Dame Elspeth Hudson Meredith, except his brother Thomas Graves Meredith who is still living and who is the father of the two defendants John Stanley Meredith and Thomas Redmond Meredith.

(10) The late John Redmond Meredith who was the father of the plaintiff Diana Meredith (Mrs. Provost) and who was the nephew of the late Charles Meredith died on the 25th day of November, 1916, and the late Maud Meredith (Mrs. William Ramsay) who was the mother of the other five plaintiff and a niece of the late Charles Meredith died in October 1928.

10 (11) The said late Edmund Meredith, junior, died on the 5th August, 1936, and is now represented by The Royal Trust Company, administrator of his estate.

(12) The plaintiffs are grand nieces and grand-nephews of the said late Charles Meredith, and are sons and daughters of nieces or nephews of the said late Charles Meredith, who had predeceased the said Dame Elspeth H. Meredith, and the said plaintiffs are the only such grandnieces and grandnephews who survived the said Dame Elspeth H. Meredith.

20 (13) The said Dame Elspeth H. Meredith had previously made a Last Will and Testament in authentic form before E. W. H. Phillips and Colleague, notaries, dated 24th February, 1930, of which a copy is herewith produced as exhibit No. 2, which was revoked by the terms of her holograph last will aforesaid.

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The question of law upon which the parties hereto are at variance is as follows:—

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#### QUESTION OF LAW

Are the defendants the only residuary legatees to whom the said Dame Elspeth H. Meredith bequeathed the said half of her residuary estate, or are the plaintiffs also entitled to share as residuary legatees par souches as being the immediate heirs of their parents, the nieces and nephews of the said late Charles Meredith who predeceased the said late Dame Elspeth H. Meredith as aforesaid?

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On the foregoing statement of facts, the contentions of the parties are as follows upon the foregoing question of law:—

#### PLAINTIFFS CONTEND:

(1) That the will in authentic form hereinbefore referred to in paragraph (13) of the Statement of Facts is irrelevant and cannot be referred to for the purpose of interpreting any of the provisions of the holograph Last Will and Testament hereinbefore referred to in paragraph (3) of the Statement of Facts.

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(2) That the provisions of the Civil Code of Lower Canada relating to *ab intestat* successions cannot be resorted to for the purpose of interpreting a testamentary disposition unless they are by the provisions of the will specially made applicable thereto, and that the said holograph Last Will and Testament contains no such provision; and

(3) That the words "immediate heirs" in the fourth paragraph of the said holograph Last Will and Testament are not descriptive of the nephews and nieces of Charles Meredith, but were intended to include and do include the plaintiffs. 10

The whole under reserve of plaintiff's right to present at the argument such further contentions in support of their conclusions as counsel may advise.

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DEFENDANTS CONTEND:

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(1) That the bequest of half of her residue to "my husband's Charles Meredith's nieces and nephews (immediate heirs)", was a bequest of that half to the defendants.

(2) That the words "immediate heirs" that she wrote in brackets, are descriptive of the nieces and nephews in question and limitative in effect and make it clear that this bequest does not apply to any children of any nieces or nephews of the late Charles Meredith.

30

(3) That there is by law no "representation" under the circumstances, as is clear by the provisions of articles 622 and 634 of the Civil Code of the Province of Quebec.

(4) That in any event, the words "nieces and nephews" would not include "grandnieces and grandnephews". There would have to be express provisions in the will so providing, and this contention is corroborated by the provisions of articles 618, 631, 632 and 633 of the Civil Code.

(5) That there is a different use of the words "immediate heirs" with regard to the two halves of the residue. In bequeathing the first half to her own brothers and sisters, the testatrix made it clear that she desired to have representation take place, and she therefore bequeathed that half to "my brothers and sisters or "their immediate heirs, including my sister Edith's family". The word "or" (which we have underlined) shows that this bequest is made with representation. On the other hand, in the bequest of the other half of the residuary estate to "my husband's Charles Meredith's nieces and nephews" the words "immediate heirs" come in brackets imme- 40

diately after the words “nieces and nephews”. There is no word “or” and nothing to indicate any intention of representation, while the absence of any representation is clearly indicated by the use of the words “immediate heirs” as qualifying the words “nieces and nephews”.

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10 (6) In the event of the holograph will being considered ambiguous, the court is entitled, for guidance as to the intentions of the testatrix, to consider the terms of the testatrix' previous notarial will, exhibit No. 2, and to give weight to the fact that in that previous will she bequeathed the residue of her estate “for one-half to my said husband's brothers and sister or to such of them as may be living at the time of my death”, while the other half was bequeathed “to my brothers and sisters or to their issue par souches by representation”.

20 WHEREFORE the parties hereto submit the present “joint factum or case” and pray for a decision upon the foregoing question of law, and

The Plaintiffs pray that by judgment to be rendered hereon it be declared that one-half of the residuary estate of the late Mrs. Elspeth H. Meredith was by her holograph Will divided into eight equal parts, which were bequeathed as follows:—one part to the plaintiff Mrs. Diana Meredith Provost, one part to the other five plaintiffs jointly, and one part to each of the six defendants, and that the said half of the residuary estate be paid and distributed accordingly.

30 The defendants pray that by judgment to be rendered hereon it be declared that one half of the residuary estate of the late Mrs. Elspeth H. Meredith was by her holograph will divided into six equal parts, which were bequeathed; one part each to the defendants Mrs. Isabel Magdalene Thorburn, Mrs. Constance M. Peters, Miss Mary Meredith, John Stanley Meredith, Thomas Redmond Meredith, and one part to the late Edmund Meredith, junior, and that the said half of the residuary estate be paid and distributed accordingly.

40 And the parties both agree that by the judgment to be rendered hereon it be ordered in any event that all the taxable costs of both parties herein be paid by and out of the one half of the residuary estate which was bequeathed to “my husband's Charles Meredith's nieces and nephews (immediate heirs)”.

Montreal, 1st March, 1937.

(Sgd.) Brown, Montgomery & McMichael,  
Attorneys for Plaintiffs.

(Sgd.) Meredith, Holden, Heward & Holden,  
Attorneys for Defendants.

STATION  
STE. ANNE DE BELLEVUE,  
P.Q.

(1)

BALLYBAWN,  
SENNEVILLE,  
P.Q.

4<sup>th</sup> June 1935

I, Elzabeth Hudson Meredith revoke all previous wills and desire this to be legal & my wishes carried out. I desire that all my debts be paid as soon as possible after my death. All funeral, hospital (if any) and succession taxes. Also if I have any nurses looking after me they shall have a small gift of money. All my possessions in both my houses at 1130 Pile Ave and at Senneville P.Q., to be divided or disposed of by my brothers and sisters. My oil painting.

(2)

STATION  
STE. ANNE DE BELLEVUE,  
P.Q.

by Sir Thomas Lawrence and BALLYBAWN,  
SENNEVILLE,  
P.Q.

My 16<sup>th</sup> century bronzes I leave to the Montreal Art gallery. To my niece Peppie daughter of my brother S. J. Angus (Victoria B.C.) I leave my pearl necklace. My jewelry I leave to my sisters but would like them to give one piece each to my sister in law Grace Angus, to my sister in law Muriel Angus & to my niece Gynette M<sup>rs</sup> Leman. I leave fifty thousand dollars to the Royal Victoria Hospital, twenty five thousand to the General Hospital and one hundred thousand dollars to the Montreal Art gallery -

(3)

STATION  
STE. ANNE DE BELLEVUE,  
P.Q.

I desire five thousand BALLYBAWN,  
SENNEVILLE,  
P.Q.

dollars to be divided between my servants both at Pile Avenue & Senneville according to length of service in my employ. I wish ten thousand dollars to be kept in the Royal Trust Company, the interest there of to be used to maintain my lot in the cemetery in good shape & order. To my god child Bridget Todd, I leave five thousand dollars, to my god child Adelaide Cooley (daughter of S. M. Eberts) I leave five thousand dollars, to my husband's god child



(4)

STATION  
STE. ANNE DE BELLEVUE,  
P.Q.

Rosanna Todd I leave  
5,000 dollars and to my friend  
Jaqueline Todd I leave five thousand dollars  
if there are still living at my death. I leave  
two thousand dollars to Peter Leupleton if  
he is still looking after my affairs, and two  
thousand dollars to Mr. David E. Crutchlow.  
The rest of my estate to be divided equally  
between my brothers and sisters or their im-  
mediate heirs including my sister Edith's family  
and between my husbands Charles Meredith's  
nieces and nephews (immediate heirs)

BALLYBAWN,  
SENNEVILLE,  
P.Q.

(5)

STATION  
STE. ANNE DE BELLEVUE,  
P.Q.

If any of my brothers or sisters will  
live in my Senneville house  
I would like the sum of \$100,000 dollars  
put in care of the Royal Trust Company the  
interest there of to be given to which brother  
or sister is living in the house to help to  
maintain the property & the property to  
become the possession of that sister or  
brother to do what she or he wishes after  
two years. This is my last will and  
request to be considered legal -

5<sup>th</sup> June 1935 - Elefeth H. Meredith

BALLYBAWN,  
SENNEVILLE,  
P.Q.

PLAINTIFF'S EXHIBIT NO. 2

In the  
Court of  
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Copy of Last Will of Dame Elspeth H. Angus, Widow of the Late Charles Meredith, passed before E. W. H. Phillips, N.P.  
24th February, 1930, under his No. 1064.

(SEAL) ON THIS DAY the Twenty-fourth of February in Year of Our Lord, One thousand nine hundred and thirty. 10

BEFORE ME, EDWARD W. H. PHILLIPS, and my Colleague, JOHN HOLDEN HUTCHESON the undersigned Notaries Public for the Province of Quebec, in the Dominion of Canada, practising in the City of Montreal, in said Province,—

PERSONALLY CAME AND APPEARED,—

DAME ELSPETH HUDSON ANGUS of the said City of Montreal, widow of the late CHARLES MEREDITH in his lifetime of the same place, Stock Broker,— 20

WHO being desirous of making her Last Will and intentions known hath made and dictated unto us, the said Notaries, her present Last Will and Testament in manner and form following, to wit,—

I direct that my just debts and funeral expenses shall be paid by my Executor and Trustee hereinafter named to whose discretion I leave it to fix and determine the manner and expense of my funeral. 30

I direct my said Executor and Trustee to pay over to the Royal Trust Company, a body corporate having its head office in the said City of Montreal, the sum of Five thousand dollars (\$5,000.) to form a Trust Fund the revenues wherefrom shall be applied by said Trust Company for the general maintenance and up-keep of the burial lot in the Mount Royal Cemetery in which my said late husband is buried, and including the planting of flowers and shrubs, grass cutting, repairs to monuments or tombstones, and other incidental work in order to keep the same in proper condition,—the whole in the discretion of said Trust Company who in regard to this bequest shall have the same powers as my said Executor and Trustee regarding the property of my Estate in general. 40

I bequeath the following cash legacies, to wit,—

To the Art Association of Montreal the sum of Two hundred thousand dollars (\$200,000.)

To the Royal Victoria Hospital the sum of Two hundred thousand dollars (\$200,000.)

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To McGill University, Montreal, for Medical Research, the sum of Two hundred thousand dollars \$(200,000.)

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10 To the Montreal General Hospital the sum of Fifty thousand dollars (\$50,000.)

All the foregoing legacies to said Institutions are bequeathed in memory of my said late husband.

I bequeath the sum of twenty-five thousand dollars (\$25,000.) to the Montreal Baby and Foundling Hospital, St. Urbain Street.

20 I direct my Executor and Trustee to distribute the sum of Ten thousand dollars (\$10,000.) among all the servants in my employ at the time of my death and not under notice to leave either given or received by me, — length of service to be taken into consideration, but the whole in the discretion of my Executor and Trustee whose decision shall finally settle any questions which may arise in connection with this bequest.

30 I bequeath the sum of Ten thousand dollars (\$10,000.) to each of my two God-children, Bridget Todd and Adalade Eberts, and the sum of Ten thousand dollars (\$10,000.) to my late husband's God-daughter Rosanna Todd.

I bequeath the sum of Tweny five thousand dollars (\$25,000.) to Mary Meredith, daughter of the late Edmund Meredith of London, Ontario.

I bequeath the sum of Ten thousand dollars (\$10,000.) to D. E. Crutchlow of Montreal, Stock Broker, in token of my thanks for the many kindnesses he has done for me.

40 I bequeath to the Art Association of Montreal the picture of Mrs. Wright by Sir Thomas Lawrence, which belonged to my father the late Richard B. Angus, and also my Sixteenth Century Bronzes.

I bequeath all my clothing, jewellery and personal effects and my furniture and household effects and the contents of my residence or residences in Montreal or elsewhere, or articles appertaining thereto including motor cars and their equipment, unto my brothers and sisters or such of them as may be living at the time of my death, in full ownership. Any differences of opinion arising out of this bequest shall be finally settled by the decision of my Executor and Trustee.

I may make a memorandum of special matters which I should like attended to and I hereby instruct my Executor and Trustee to give such memorandum full force and effect.

AND as to all the rest, residue and remainder of my Estate and property, real and personal, movable and immovable, and wheresoever the same may be situate, including all property which I may have power to affect by Will I give and bequeath for One half ( $\frac{1}{2}$ ) to my said husband's brothers and sister or to such of them as may be living at the time of my death, and for the other half ( $\frac{1}{2}$ ) to my brothers and sisters or to their issue *par souche* by representation in the case of each of them who may predecease me leaving issue but if any of them should predecease me without leaving issue accretion shall take place in favour of the others (with representations *par souche* in favour of the issue of any then dead).

All Succession Duty, Seizin Tax, if any be legally payable, and other taxation and charges arising out of my death on the special bequests herein shall be paid out and charged to the capital of the residue of my Estate.

WHILE any of the beneficiaries under this my Will are minors their shares shall remain in the possession of my Executor and Trustee who shall use the revenue therefrom for their benefit, but it shall not be necessary to spend the whole of such revenue in each year if my Executor and Trustee does not deem it advisable.

All bequests herein shall be the private property of the beneficiaries respectively excluded from any community of property arising through marriage and in the case of women shall be free from all control and/or liability by or on account of their respective husbands at any time and may be accepted and received by them without marital authorization.

AND in order to execute my present Last Will and Testament I hereby constitute and appoint The Royal Trust Company, a body corporate having its head office in the said City of Montreal, to be the Executor and Trustee hereof, hereby extending its power and authority as such over and beyond the year and day limited by law until the full accomplishment of this my Will, with full power to borrow money and to oblige my Estate for such obligations as it may see fit (including endorsements, guarantees, or other obligations of a commercial or business nature), to carry on any business or undertaking in which I may be interested, to compromise, transact and accept part in satisfaction of the whole of any claims by my Estate, to grant *Main Levee* and discharge of security and to sell, hypothecate, pledge, alienate, and otherwise dispose of any and all property of my Estate, both movable and immovable in such manner as it may see fit, the whole without judicial authorization being necessary.

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I hereby give my Executor and Trustee full power to retain any investments in any business or otherwise which I may hold at my death and to invest and re-invest the moneys of my Estate in such investments as it may consider safe without being limited to the investments permitted to Executors and Trustees by law.

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10 In making any division of my Estate or any part thereof my said Executor and Trustee is authorized to compose the shares, fix the values whenever necessary of all assets composing the same and do all acts necessary or expedient to carry out such division in its own discretion without its being necessary under any circumstances to have judicial proceedings in regard thereto even though some of the beneficiaries may be minors or otherwise incapable, — and it is hereby authorized if it see fit to retain in its hands my property not deemed by it susceptible of advantageous division at the time and to dispose of such property at a later date and divide the proceeds.

20

My said Executor and Trustee shall be responsible for good faith only and it shall not be obliged to give security for the administration or disposal of my Estate in any country where such security may be required notwithstanding any law or custom to the contrary, — and in making the Inventory of my Estate it may make the same in such form as it may see fit and may omit any formalities in regard thereto.

30 My said Executor and Trustee shall pay or deduct all expenses as they may be from time to time incurred in connection with the administration and/or disposal of my Estate or any part thereof before paying over the revenue, and it shall have full power to settle and determine all questions which may arise in relation to my Estate or any part thereof and may determine whether any money and/or other assets shall for the purpose of this my Will be considered as revenue or capital and what expenses and/or liabilities are to be paid out of or charged to revenue or capital respectively, unless herein specially provided for.

40 The said Royal Trust Company shall be entitled to its usual remuneration in connection with my Estate.

I hereby revoke and cancel all Wills, Codicils and Testamentary dispositions by me heretofore made.

THUS DONE AND EXECUTED at the said City of Montreal in the office of me, the said Edward W. H. Phillips, at or about the hour of Fifteen minutes to Twelve of the clock of the forenoon on the day and date first aforesaid and remaining of record in my office under the Number Ten thousand nine hundred and sixty four of my Notarial Records and

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signed by the said Testatrix with and in the presence of us the said Notaries who have signed in the presence of the said Testatrix and of each other, after these presents had been first duly read to the said Testatrix by me, the said Edward W. H. Phillips, in the presence of the other Notary, the whole according to law.

(Signed) Elspeth H. Meredith  
J. H. Hutcheson, N.P.,  
E. W. H. Phillips, N.P.

10

A true copy of the original hereof which remains of record in my office.

(Signed) E. W. H. Phillips, N.P.

the  
Superior  
Court  
—  
No. 2  
Judgment  
the  
Superior  
Court,  
Hon. Chief  
Justice  
Greenshields  
April 1937

No. 2

20

The Judgment

Province of Quebec  
District of Montreal

SUPERIOR COURT  
This 3rd April 1937.

PRESENT HON. CHIEF JUSTICE GREENSHIELDS

This case is before the Court under Art. 509 of the Code of Civil Procedure of this Province, and upon the joint "Factum or Case" which contains a statement of the facts which give rise to the question calling for decision and determination. The parties, plaintiffs and defendants, are in agreement as to the facts, but disagree on "the question of law involved".

Although the question involved is stated to be a "question of law", in the final analysis the question involved and arising from the facts stated, is the interpretation of the holograph Will made and executed at Montreal on the 5th day of June, 1935, by Elizabeth Hudson Meredith, in her lifetime of the City and District of Montreal, widow of the late Charles Meredith, in his life time of the same place, broker.

40

By her Will the testatrix made a testamentary disposition of a gross estate, which, as admitted by the parties, amounted in value to \$2,500,000.00.

Again, it is common ground that she did make a testamentary disposition of her entire estate, and the division of that estate must be made strictly in accordance with the terms of the testatrix' Will when her intention as evidenced by the words she used in the Will which she made, is ascertained.

If in the intrepertation of the Will the issue lies between testacy or intestacy, greater latitude of construction may be permitted to prevent intestacy since it is perfectly evident the testator by the making of the Will could not have intended the latter. In this case, however, no such question arises; testacy, no matter what the issue, in the present case may be, remains intact; it is merely a controversy between the rival claimants.

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In the consideration of the present issue, involving as it does the interpretation of a Will, it does not follow that because a difference of opinion has arisen between certain persons, some of them admittedly legatees under the Will, and other members of the same family who assert that they are legatees under the true construction of the Will, any ambiguity is to be found in the words used by the Testatrix to give expression to her real intention. If and when the words found in a testamentary document are given the usual ordinary meaning and no ambiguity arises, then the plain duty of the Court is to give effect to the words used.

20

This leads to the statement, that cases to which the learned Counsel for the plaintiffs has referred the Court are, no doubt illuminating and interesting, but are of use only when a Court is dealing with the Will of a person who in giving expression to his or her intention, made use of words creating a condition of ambiguity. If a Court finds none in the document itself, taken as a whole, then the cases laying down rules, principles or canons of interpretation, are perfectly useless and offer no assistance.

30

A better rule cannot be found than that laid down in many cases in the Court of this Province and this Dominion, as well as in English cases, and that rule is expressed in this way:

“The Courts do not determine what a testator intended to say, but what the testator intended by what he did say; what he intended by the words used in giving expression to his intention.”

40

This leads to the further statement, that no Court is competent to make a Will for a deceased person, or to remake or modify, detract from or add to such a Will. The limit of the Court's function is, to determine the true construction or interpretation of the Will; to determine the intention of the testator by all available legal means, particularly by a consideration of the whole testamentary document and the words therein employed or used by the testator, and when that intention is found, the Court must give it full force and direct and decree the complete carrying out of the wishes of the deceased person. In other words, the enforcement of the complete execution of the Will.

As already stated, the Will under consideration was signed on the 5th of June, 1935. The testatrix died on the 24th of June, 1936, about one

year after she had made her Will. No change by way of a Codicil or modification of the Will was made by her during her life time. On the 29th of July, 1936, the holograph Will was duly probated.

However, the holograph Will of the 5th of June, 1935, was not the only Will the deceased testatrix had made. On the 24th of February, 1930, she made a Will in Notarial form before Phillips, N.P., and his Colleague, Hutchison, N.P. A copy of this Notarial Will is in the record and marked ex. No. 2. The Plaintiffs objected to the production of the copy of this Will on the ground, that it is entirely irrelevant to the issues to be decided in the present case. Reference is made to the Notarial Will only because it is in the record, and no further reference will be made to it. The decision of the Court in interpreting the holograph Will of the Testatrix will in no way be based upon or influenced by the Notarial Will which the Testatrix made some five or six years before her holograph or last Will was made.

It is common ground that the very substantial fortune possessed by the Testatrix in her absolute right was in its origin derived from two sources, one from the Will of her late father, Mr. R. B. Angus, and the other from the Will of her late Husband, Charles Meredith. From the argument submitted as well by the plaintiffs' Counsel as Counsel for the defendants, it is proper to assume that the Testatrix received one half, or approximately one half of her fortune, from the Will of her late father, and the other half, as already stated, from the Will of her late husband.

It is also to be observed that when Charles Meredith bequeathed this fortune to his wife, the bequest was made without restriction or reservation. By his Will his widow, the Testatrix herein, was given the absolute ownership of all the property, real and personal, moveable and immoveable, which passed to her upon the death of her husband, by his Will. She, therefore, had the absolute right to deal with that property as he saw fit. She could sell it; she could make a donation *inter vivos* of any part of it, or the whole of it, and she could by her Will dispose of it in any manner that to her seemed best. In other words, she had an absolute freedom to dispose of the property which she had received from her husband in any manner and to any person or persons she saw fit.

Again, it is apparently common ground, that the Testatrix in proceeding to make her last Will and Testament, had decided upon a certain plan of division. I use the word "plan" because Counsel for both plaintiffs and defendants frequently made use of that word in submitting their respective pretensions. Realizing, says the learned Counsel, that one half of her fortune had come from her father, R. B. Angus, and the other half from her husband, Charles Meredith, the Testatrix decided that one half of the fortune left by her on her death should go to the Angus family,

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or such members of that family as she saw fit to select for the purpose of her generosity, and the other half to such members of the Meredith family as, in like manner, she chose to be the objects of her liberality.

10 The learned Counsel for the Plaintiffs, in a very able and exhaustive submission, urged that the Testatrix, was guided by one principle in making her Will, and that was, the principle of doing justice as between her husband's family, and that of her own family, the Angus family.

20 The Court is unable to follow the learned Counsel for the plaintiffs to the length he goes in this somewhat (in the view the Court takes of it) unimportant phase of the case. The Testatrix was under no obligation to do justice to any one, she was under no moral obligation, much less a legal obligation, to bequeath her fortune to either the Angus family or the Meredith family. She had been bequeathed by her father and by her husband what they thought, for reasons sufficient to them, she was entitled to, or which their generosity induced them to bequeath to her. In both cases it was a testamentary legacy, and in both cases it was free from any restrictions or reservations, and subject to no conditions. As already mentioned, it was her absolute property, and she was unaccountable to no one during her lifetime with respect to her dealings with this bequest; at her death no one could question her right to bequeath it to whomsoever she might choose, provided her Will violated no provision of law.

30 It is true, however, when she made her Will, there being no issue of her marriage with Charles Meredith, having no children of her own, she divided the residue of her estate in two equal halves and proceeded to make a disposition of the entire residue. In plain words, impossible of misunderstanding, she gave one half of the residue to her next of kin, members of the Angus family. Exercising her perfect right she made a choice of the members of that family to whom the bequest would go. These are the words she used when giving expression to her wish and intention —

40 "The rest of my Estate to be divided equally between my brothers and sisters or their immediate heirs, including my sister Edith's family.'

The words she used leave no room for doubt and create not the slightest ambiguity. As already said, knowing that unless she made provision in her Will for representation none would exist, and she expressly provided that that part of her Estate bequeathed to her brothers and sisters, should go to their immediate heirs. Having thus provided for her brothers and sisters and their immediate heirs, she proceeded to deal with the remaining half of the residue of her Estate, which she had decided would go to her husband's family, the Merediths. Again, exercising the

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power and right she had, she selected the members of the Meredith family who would benefit by her generosity, and this is what she said, putting a comma after the word "family", and between my husband's, Charles Meredith's nieces and nephews", and in brackets "immediate heirs". Another case in which words are bracketted is found in a bequest to her god-child in these words, "to my god-child Adelaide Cooley", then in brackets, "(daughter of Dr. E. M. Eberts) I leave \$5000.00."

10

The able argument of the learned Counsel for the plaintiffs has not satisfied the Court that if it was the intention of the Testatrix to create representation in favor of the children of the nephews and nieces of her late husband, why she did not express that intention in the words she used in giving expression to her intention regarding her brothers and sisters, members of the Angus family. It is impossible to reach the conclusion that the Testatrix intended the same result by the words,

"The rest of my estate to be divided equally between my brothers and sisters, or their immediate heirs, including my sister Edith's family".

as she did when she used the words,

"and between my husband's Charles Meredith's nephews and nieces (immediate heirs)."

She fully intended that the bequest should go to the immediate heirs of her brothers and sisters, and she expressed her intention in clear words.

30

The intention to continue the bequest in favor of the children of her husband's nephews and nieces cannot be found in her Will unless some words are added to the words the Testatrix used. Having regard to the circumstances under which the Testatrix made this Will and the knowledge she had, it is impossible for the Court to supply any omission or to add any words to her Will unless it is perfectly clear what words were by the Testatrix omitted.

So far as the law of this Province is concerned, there is no doubt that a bequest to "nephews and nieces" excludes grand-nephews and grand-nieces.

40

In passing a word must be said with respect to the submission made by the learned Counsel for the plaintiffs in support of the plaintiff's claim. It is said that if all the nephews and nieces died the whole purpose and intention of the Testatrix would be destroyed and one half of the Estate would become an *ab intestate* succession, and revert, eventually, to

the Angus family. Such an event might happen. It is not difficult to give many illustrations where events beyond human control might happen and thereby completely defeat the intention and purpose of the Testatrix.

10 When Mrs. Charles Meredith made her Will there were nephews and nieces of her husband living. She did not speculate what might happen if all her nephews and nieces died. If she entered upon that field of speculation it is possible she did realize that having done full measure of justice to the Meredith family she was perfectly satisfied if her estate came back to her own family. This is merely in passing, as the Court attaches not the slightest importance, in determining the true interpretation of the Will, what might possibly happen if disaster overcame a member or members of the Meredith family.

20 The whole difficulty in the present case comes, admittedly, from the Meredith family. The perfect good faith of the plaintiffs is freely admitted. Briefly stated, the question is this: Charles Meredith in his life time was the Uncle of certain nephews and nieces. Some of them had married and children were born of the marriage, and they became and were grand-nephews and grand-nieces of the testatrix. These grand-nephews and grand-nieces now submit that under the true construction of the Testatrix' Will, and the proper interpretation to be placed upon it, they as such grand-nephews and grand-nieces are entitled to received under the Will that part of the Testatrix' fortune which would have come to and been received by their parent or parents, who was or were nephews or nieces of the late Charles Meredith.

30 They find support for their claim, and, indeed, the sole support, in the two words contained between brackets after the word "nephews", "immediate heirs".

40 With much emphasis the learned Counsel for the Plaintiffs urged, that the Testatrix meant and intended by the words "immediate heirs", the immediate heirs of a nephew or a niece of Charles Meredith. In other words, that the Testatrix provided for a representation in favor of the children of a nephew or niece, being grand-nephews or grand-nieces of the deceased, Charles Meredith and of the Testatrix.

Defendants' Counsel, on the other hand, with equal emphasis and vigor, asserts that the Testatrix used the two words in brackets for the sole purpose of identifying or describing the legatees intended by her to benefit by her Will.

Making reference to the able argument submitted by the learned Counsel for the plaintiffs (Mr. Chipman), in part he says:

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“When she chose her starting point with regard to the Anguses she provided for representation. When she chose her starting point with regard to the Merediths, in my submission she again chose representation, and having used the words “or their immediate heirs” to carry representation when she dealt with the generation of Anguses one generation higher up, my submission is she took exactly the same words, ‘immediate heirs’ to accomplish precisely the same purpose when she started a generation lower in connection with the Merediths.” 10

The submission made by the learned Counsel is somewhat weakened by the fact, that when the Testatrix wished to create representation so far as the Angus branch was concerned, she made it perfectly clear “—between my brothers and sisters or their immediate heirs, including my deceased sister Edith’s children”. Nothing could be clearer, and if she had used exactly the same words in the bequest to the Meredith family, the whole matter would be perfectly free from difficulty. But she did not, and the learned Counsel continuing his submission, on p. 18, states: 20

“My friends cannot maintain that contention, and I submit the Court cannot come to that conclusion, but by adding the word ‘his’ before the words “immediate heirs” because by themselves ‘immediate heirs’ in brackets are completely and absolutely meaningless, and the point is, to what particular persons do they refer.”

It follows that if the plaintiffs are to succeed, an addition must be made to the words used by the Testatrix, and words must be added to those used by the Testatrix. In dealing with the Angus bequest the Testatrix chose and used the words which the plaintiffs ask the Court to add to the words used by the Testatrix in dealing with the bequest to the Meredith family. The Court is urged to do this in order that the plaintiffs may succeed in their claim as by them made. If, as stated by the learned Counsel, the words in brackets are completely meaningless unless supplemented by some word or words, the plaintiffs cannot succeed without the Court adding the words suggested by their Counsel. On the other hand, the words “immediate heirs” have a distinct legal meaning, and they may well be accepted as descriptive of legatees whose names were not mentioned and were not otherwise identified than as being the nephews and nieces of Charles Meredith. 30 40

One thing is certain, they were nephews and nieces of Charles Meredith; and another thing is equally certain, they were the immediate heirs in law of Charles Meredith had he left an *ab intestate* succession.

The submission of the defendants further finds support in the fact, that the Testatrix made use of words in brackets to indicate or describe or

identify persons who were the object of her generosity; for example, we find this — “to my niece, Peggy, daughter of my brother D. J. Angus (Victoria B. C.)’.” Again, as already mentioned, — “to my god-child, Adelaide Cooley, (daughter of Dr. E. M. Eberts).” Clearly, words manifestly used for the purpose of describing or identifying the beneficiary.

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10 I dispose of this aspect of the matter with the statement, that I will not add any words to the Will of the Testatrix. I am able to find in the words used by the Testatrix a sufficiently clear expression of her testamentary intention and wishes.

I accept the statements made by the learned Counsel for the plaintiffs, as they appear on p. 34, wherein I find the following:

20 “The result of all the cases in regard to supplying words seems to be, that it cannot be done unless it is clear what that precise omission was, and the doctrine of the later and best considered cases is, that the omission can not be supplied unless the order of the different portions of the instrument, the collocation of the sentences, or something else, in the grammatical construction affords clear and satisfactory ground of presuming precisely what implication is to be made. In other words, that you cannot by mere construction incorporate distinct provisions into the Will however certain it may be that they were omitted by mistake; but the defects to be supplied by construction must be such as necessarily suggest themselves from the words used in connection with admissible facts as the only reasonable and sensible meaning deductible from the whole instrument.”

30

The Testatrix was perfectly aware that if representation was to take place, it had to be so stated in her Will, and she had at hand apt and proper words with which to express her intention to create representation. She used those words once, and it must be concluded that she deliberately omitted to use those words in another case.

40

The matter has received my best consideration, as have the many cases to which much reference was made and copious and extensive extracts read into the argument, and the conclusion has been reached, that the plaintiffs must be denied the relief they seek. In consequence their action and demand is dismissed.

And it is by this judgment declared, that one half of the residuary estate of the late Mrs. Elspeth H. Meredith was by her holograph Will divided into six equal parts, which were bequeathed: one part each to the defendants Mrs. Isabel Magdalene Thorburn, Mrs. Constance M. Peters,

Miss Mary Meredith, John Stanley Meredith, Thomas Redmond Meredith, and one part to the late Edmund Meredith, Junior, and that the said half of the residuary estate be paid and distributed accordingly.

Seeing the agreement made between the parties it is Ordered that the taxable costs, as well in demand as in defence, be paid by and out of the one half of the residuary estate bequeathed to the Meredith branch. 10

(Signed) R. A. E. Greenshields,  
C.J.S.C.

No. 3

Inscription in Appeal

Canada  
Province of Quebec  
District of Montreal.  
No. 158557

COURT OF KING'S BENCH  
(Appeal Side)

20

The Appellants inscribe this case in Appeal before the Courts of King's Bench (Appeal Side) from the judgment rendered on the 3rd day of April, 1937, by Honourable the Chief Justice R. A. E. Greenshields, dismissing the action and demand of the Plaintiffs, but, allowing the Defendants no costs from the Plaintiffs; and Appellants give notice to Mtres. Meredith, Holden, Heward & Holden, Attorneys for Respondents, that the present inscription has been this day produced in the Prothonotary's office of the said Superior Court and that on Monday, the 3rd May, 1937, at eleven o'clock of the forenoon before the Prothonotary of the said Superior Court sitting in and for the District of Montreal at his office in the Court House in Montreal, Appellants will give good and sufficient security that they will effectively prosecute the said appeal and that they will satisfy the condemnation and pay all costs adjudged in case the Judgment appealed from is confirmed, and that the security which they will offer will be a bond of the Canadian Surety Company, a body corporate, authorized by the laws of this Province to act as judicial surety, which will then and there justify as to its solvency if so required; and do you govern yourselves accordingly. 30 40

Montreal, 29th April, 1937.

(Sgd) Brown, Montgomery & McMichael,  
Attorneys for Appellants.

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(Sgd) Brown, Montgomery & McMichael,  
Attorneys for Appellants.

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No. 4

Appellant's Factum

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10 1. This is an appeal from the judgment of the Honourable the Chief Justice of the Superior Court rendered the 3rd April 1937, dismissing the Plaintiffs' action to have it declared that one-half of the residuary estate of the late Mrs. Meredith was by her Holograph Will divided into eight equal parts, one of which should go to the Plaintiff Mrs. Diana Meredith Provost, another part to the other five Plaintiffs jointly and the six parts to the Defendants; and declaring instead that the residuary estate in question was divided into six equal parts of which five of the Defendants take one share each and there remaining two divide the sixth.

20 2. The facts are fully set forth in the Statement of Facts.

3. Paragraph 2 of the Statement of Facts says:

“(2) At the time of her death, the estate of the late Dame Elspeth Hudson Angus (Mrs. Meredith) was of the gross value of \$2,500,000.00, and was derived approximately as to one-half from the estate of her late father R.B. Angus, and one-half from the estate of her late husband Charles Meredith”.

30 The fourth paragraph of the Will reads (in part):

“The rest of my estate to be divided equally between my brothers and sisters or their immediate heirs including my sister Edith's family and between my husband's Charles Meredith's nieces and nephews (immediate heirs).”

Paragraph 7 of the Statement of Facts says:

40 “(7) The residuary estate of the said late Dame Elspeth H. Meredith was thereby divided into two equal halves, one of which halves was to be divided “between my husband's Charles Meredith's nieces and nephews (immediate heirs)”.

4. The issue is whether the words “immediate heirs” in clause 4 of the Will meant the immediate heirs of the legatees Meredith should any of them fail to survive the Testatrix, just as in the earlier part of the same clause the words “immediate heirs” meant the heirs of the legatees Angus; or whether the Testatrix, in the second part of the clause, was using the words to describe the legatees as the immediate heirs of her husband.

5. The first alternative, it is submitted, is the only one consistent with the general plan and intention of the Testatrix. The second is inconsistent therewith and is, in fact, inaccurate as next appears.

6. T.G. Meredith, a brother of the late Charles Meredith, survived the Testatrix. On the basis of the Respondent's contentions, he was one of the immediate heirs of the late Charles Meredith. His two sons, accordingly, were not. To the extent that he was excluded as a legatee and his two sons were included, the selected legatees were not and could not be described as the "immediate heirs" of Charles Meredith. 10

7. The learned Chief Justice took the view that the words "immediate heirs" were merely descriptive of the legatees as being the immediate heirs of Charles Meredith, and founded his judgment accordingly. He says:

"One thing is certain, they were nephews and nieces of Charles Meredith; and another thing is equally certain, they were the immediate heirs in law of Charles Meredith had he left an *ab intestate* succession". 20

It is submitted that this finding is erroneous in fact and vitiates the judgment.

8. The Chief Justice further held that the construction contended for by the Appellants demands the addition of words to the Will, while the construction contended for by the Respondents does not and he declines to make any such addition. 30

It is submitted that the learned Chief Justice, on the construction chosen, necessarily himself adds words to the Will. The words "immediate heirs" by themselves are meaningless. If they are to be descriptive of the legatee as being the immediate heirs of Charles Meredith, they would require some such introductory words as "being his".

9. The learned Chief Justice further held that there could be no representation in favour of the children of a nephew or niece of Charles Meredith predeceasing the Testatrix because she expressed no such intention, but instead "selected the members of the Meredith family who would benefit by her generosity". 40

It is submitted that the Testatrix chose the Meredith legatees, not on grounds of affection or for personal reasons but as representatives of the family; and that where legatees are chosen as representatives of a family, representation applies. It is further contended that representation must follow in the present case because of the introduction of the words "immediate heirs".

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References:

- Art. 937 C.C.;  
Mignault — Vol. 3, p. 255; 309; 328;  
La Themis — Vol. 1 (1879), pp. 22 and 28;  
Dore v. Brosseau — 13 K.B. 538 at p. 547;

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10       The above authorities are assembled and quoted in the Appendix at pp. 29 to 31;

20       **10.** The Appellants contend that the judgment contradicts the plan of the Will by which, on grounds of justice and equity and not grounds of affection or for personal reasons, the Testatrix intended to give back to her father's family the one-half of her fortune which came from that family and to her husband's family the one-half of her fortune that came from it. Having provided for representation as regards the representatives of the Angus family by the words "or their immediate heirs" following the reference to the legatees, it is submitted that the Testatrix used the same words "immediate heirs" following the reference to her husband's nieces and nephews to accomplish the same purpose. In the loosely written Will of one *inops consilii*, the bracket represents the equivalent of the words "or their".

30       **11.** It is to be noted that once the nephews and nieces were chosen as representatives of the Meredith family, they were given an equal right, whether they were brothers or cousins; and, it is submitted, their representative character having been thus established, equity, under the plan of the Will, could only be maintained thereafter on a basis of representation.

40       The basic plan of division between the two families could not have been accomplished in the present case without a Will. It is submitted that when the Testatrix, to the extent of one-half her fortune, intervened to prevent the application to her estate of the law of ab intestate succession, she must be deemed to have intended the consequences which would equally prevent the accidental frustration of her Will. Without representation and if none of the first generation of nephews and nieces had survived the Testatrix, the whole disposition in favour of the Meredith family would have elapsed, and the basic desire of the Testatrix, operable only through the instrumentality of a Will, would have been defeated. Such a consequence could only follow if there were no words applicable to the Meredith family equivalent to the words "or their immediate heirs" already applied to the Angus family. It is contended that the words "immediate heirs", in brackets, inserted after one set of legatees, must be held to be such words, and being apt on that construction to accomplish the necessary purpose of representation, must be so construed.

**12.** It is submitted that once the reason and aim of the Testatrix' intervention has been discovered in the Will one must do everything short of making a new Will, to give effect to the reason and aim so discovered:

“ The intention, when legitimately proved, is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, and to supply the place of express words, in 10 cases of difficulty or ambiguity. ”

References:

- Halsbury, Wills, Vol. 28, p. 651, note (q);  
In re Harrison — Turner v. Helard, 1885, L.R. Ch. D. 30, 390 at p. 393;  
Halsbury, Wills, Vol. 28, p. 655 — No. 1276;  
Beal's Cardinal Rules of Legal Interpretation, 3rd Ed. pp. 170; 175;  
Mellor v. Daintree, L.R. 33, Ch. D. 198 at pp. 206 and 207;  
Jarman on Wills, 7th Ed. Vol. 3, pp. 2146 and 2147—Rules XVI, XIX and XX; p. 561; 20  
Redfield, Law on Wills, 4th Ed. (Boston) 1876, Vol. 1, Bo. 33, pp. 458 to 461; 462; 468, para. 12 and pp. 468 and 469, paras. 15, 16, 17 and 18;  
Gordon v. Gordon, L.R. (1871-72) Vol. V. A.C. 254 at 283 et seq.;  
Smith and Ready (1927) 3 D.L.R. 991;  
Maitland v. Chalie, 6 Madd.;  
In Re Cooper, 14 D.L.R. 172, 174;  
In re Smith's Trusts referred to at page 497 of the report of In re Sibley Trusts, L.R. 5 Ch. D. (1877), 494; 497-8; 30  
Ex parte Dame Allison, 51 S.C. 188, at p. 190;  
White v. Scoles, The Law Times Reports, Vol. LXXX, 701 at p. 702;  
Oddie v. Woodford, 3 My. and C.R. 584 at 614 (40 Eng. Rep. 1052 at p. 1063);  
In re Tyhurst, 1932 S.C.R. 713 at p. 717;  
In re Fulton, 15 O.W.N. 220;

The above authorities are assembled and quoted in the Appendix at pp. 10 to 29 incl. P. 32.

**13.** On the Respondents' contention that there is no representation, the Will is construed so as to give the same effect to it with the words “(immediate heirs”) as without them. The words, as merely descriptive of the nieces and nephews of Charles Meredith, are useless if the nieces and nephews were selected on personal grounds. Their presence accomplishes a purpose if they are construed to negative the Respondent's contentions and as helping, together with the selection of the Meredith legatees as representatives of a family, to manifest the intention that representation shall take place. 40

Reference:  
Article 937 C.C.

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10 **14.** When the Testatrix referred to immediate heirs, in dealing with her own family, she made it clear that it was not her immediate heirs but the immediate heirs of the legatees that she had in mind. Similarly the words "immediate heirs" in the second part of the sentence should consistently refer to the immediate heirs not of her husband but of the class selected by her for benefit.

The learned Chief Justice says:

20 ".....the words 'immediate heirs' have a distinct legal meaning, and they may well be accepted as descriptive of legatees whose names were not mentioned and were not otherwise identified than as being the nephews and nieces of Charles Meredith".

Apart from the inaccuracy here involved, it is submitted that the words "immediate heirs" have no distinct legal meaning. If "heirs" means "heirs at law" and if heirs at law are those who take first, there can be no distinction between heirs and immediate heirs. The words "heirs" alone does not necessarily mean "heirs at law", it includes those who receive by testamentary succession.

30 Reference:  
Article 957 C.C.

It is submitted that the words "immediate heirs" are not words of art and, accordingly, should not be construed as descriptive. Their meaning is to be gathered from the context and particularly by reference to the preceding clause in which the same words appear. The point is not the meaning of the words but the meaning of the Testatrix as found in the Will as a whole.

40 Reference:  
Martin v. Lee, (Privy Council) 11 L.C.R. 84;

**15.** The Respondents deny representation on grounds peculiar to the law of abintestate succession. It is submitted that the rules regarding representation in abintestate successions are inapplicable here because:

(a) Articles 618 to 634 of the Civil Code have to do with the succession of the *de cuius*, whereas the Respondents attempt to apply them to the estate of the husband of the *de cuius*;

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(b) Where the Code intends that the rules of abintestate succession shall apply to wills it expressly says so.

References:

Articles 735 to 744, 874, 878 and 885;

(c) The law of abintestate successions does not apply to wills unless the Code especially so provides.

References:

Mignault, Vol. 3, pp. 526 and 548;

Baudry-Lacantinerie, 3rd Ed. Successions, Vol. 3, p. 198, no. 2694;

Planiol, Vol. 3, 2215;

Planiol & Ripert, 1928, Vol. 4, Successions, Nos. 566, 567, 569;

Carpentier Repertoire Rapports, No. 39;

Lyman v. Holden, 18 R.L. p. 4;

Mignault, Vol. 3, pp. 253, 254 and 365.

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(d) The rules as to representation in abintestate successions have replaced the earlier principle represented in the original draft of Article 599 C.C., of *paterna paternis, materna maternis*, or of justice and equity as between family lines. The Codifiers finally replaced this notion by the Roman law notion of presumed affection, and on this basis, while representation can go on indefinitely in the direct line, representation does not carry in the collateral line beyond nephews and nieces because affection is not presumed to go farther.

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References:

Mignault, Vol. 3, pp. 255, 309 and 328;

La Themis, Vol. 1, (1879) pp. 22 and 28;

Dore v. Brosseau, 13 K.B., 538 at 547, where Mr. Justice Hall, speaking for the Court, and referring to the doctrine of representation says:

“ It is clearly limited by the articles of our Code 829 and 937, and to the comments of the codifiers, to the case of intestate succession, and based upon the supposition of what would have been the wish, according to natural affection, of a deceased person who made no will, but it has no application to cases like that under consideration in which the deceased was not content to have his estate divided according to the natural law of inheritance, but took the pains to express by a formal testament what were his special wishes as to such distribution ”.

The above authorities are assembled and quoted in the Appendix at pp. 30 and 31.

If, in the present will, the Testatrix chose her legatees not on personal grounds or on grounds of affection but because of the over-riding desire to do what was fair and just to the Meredith family, the principles applicable would be not those of the new law as now expressed in Article 599 with the consequence of limiting representation in the collateral line, but those of the old law of fairness to family lines which the Codifiers set aside. It is submitted that where such a principle is behind the Will it represents, together with the reference to "immediate heirs", the manifestation on the part of the Testatrix that representation should take place.

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Reference:

Article 937 C.C.

16. Once the roots were selected by the Testatrix as severally representative of the Meredith family, a fair distribution could only be achieved by representation. The inequitable and fantastic results that might have arisen on the Respondents' contention are illustrated not only as suggested in paragraph 11 above but also by the following: Among the Defendants are the children of the late Edmund Meredith, Jr., who died on the 5th August, 1936 (paragraph 11 of the Statement of Facts. The Testatrix died on the 24th June 1936 (Statement of Facts—Had Edmund Meredith died a few weeks earlier his representatives instead of being Defendants would have become Plaintiffs. It is submitted that a construction should not be adopted which imposes upon the Will so capricious an intention.

17. The Respondents, in the Court below, referred to the prior Will. It is submitted that this should not enter into consideration inasmuch as the older Will was revoked by the later.

The Respondents in this connection referred to *re Tyhurst 1932 S.C.R. 713 at 719*. It is submitted that the "circumstances surrounding" in that case were those obviously effective in the will and that nowhere does this case refer to any modification of the rule laid down in the authorities cited by the Plaintiffs to the effect that a revoked will can be looked at only to help to identify legatees in cases of doubt but never to construe the meaning of the subsequent bequest.

References:

Beal on Legal Interpretation— p. 628;

Jarman, Vol. 1, p. 288.

21. The Appellant submit that the judgment appealed from is bad and should be reversed for he following, among other reasons:

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(a) It is based upon a substantial error of fact and treats as descriptive words which, on the interpretation it gives them, are necessarily midescriptive;

(b) It rejects the construction contended for by the Appellants on the ground that additional words are required thereby, though an identical objection applies to the construction adopted by the Court; 10

(c) It treats the words in question as words of art and therefore as descriptive, whereas their meaning can only be gathered from the context of the Will and particularly by a reference to what precedes;

(d) It so construes the Will as to give no useful effect to the words in question and rejects the only construction which makes them useful and consistent with the general plan of the Testatrix;

(e) It assumes that the Testatrix, selected the legatees Meredith on personal grounds and, accordingly, holds that representation would not take place, whereas by the plan of the Will, as well as by her specific language, it is clear that the Testatrix chose the legatees on a representative basis and contemplated representation accordingly. 20

The whole respectfully submitted.

Montreal, June 12, 1937.

Brown, Montgomery & McMichael, 30  
Attorneys for Appellants.

(a) *Rule against intestacy:*

*In re Harrison. Turner v. Hellard, 1865, L.R. Ch. D. 30, 390, at 393, where Lord Esher, M.R. says:*

“There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce, — that he did not intend to die intestate when he has gone through the form of making a will.” 40

Compare *Halsbury's Wills, pag 665, No. 1276.*

(b) *Rule as to deeds:*

See *Beal's Cardinal Rules of Legal Interpretation, 3rd ed. at p. 175:*

10 “If a deed can, therefore, operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed.”

*Solly v. Forbes (1820), 2 Brod. & B. 38, at pp. 48, 49, Dallas, C.J. (This rule was referred to and applied by Wilde, C.J., in the case of Ford v. Beech (1848), 11 Q.B. 852, at p. 870; 17 L.J. Q.B. 114 at p. 117.)*

20 “If a deed can, therefore, operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever *astute* so to construe it as to give effect to the intent; and the construction I need not add, must be made on the entire deed.” *Squire v. Ford (1851), 9 Hare, 47, at p. 57; 20 L.J. Ch. 308, at p. 312, Turner, V.-C.*”

(c) *Rule of greater latitude for Wills:*

*Beal's Cardinal Rules of Legal Interpretation, 3rd. Ed., page 170:*

30 *Intention of Parties.*

“*Distinction between the case of a Deed and a Will.*

40 “He (Lord Eldon) first adverts to the well-known distinction which has at all times prevailed as to the construction of deeds and wills, and which I have always understood to be this, that, although in both cases the Courts look to the intention of the parties, yet in construing a deed, unless there be in the deed some manifest contrariety or contradiction, rendering a different interpretation necessary in order to effectuate the intention of the parties, the Courts are guided by the strict legal meaning of words; but in the case of a will, the testator is supposed to have been *inops consilii*, and on that ground alone a greater latitude is allowed in the construction of legal terms.’ *Lewis v. Rees (1856), 3 K. & J. 132, at pp. 146, 147; 26 L.J. Ch. 101, at p. 104, Wood, V.-C.*”

(d) *Rule of control through intention* — See Halsbury, *Wills, Vol. 28, page 651, note (q):*

“(q) Manning’s Case (1609), 8 Co. Rep. 93 b, 95 b, (e the intention of the devisor expressed in his will is the best expositor, director and disposer of his words’); *Doe d. Long v. Laming* (1760) 2 Burr, 1100, 1112. As to the general rule relating to intention, see p. 626 ante. The intention, when legitimately proved, is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words and to supply the place of express words, 10 in cases of difficulty or ambiguity’. (*Re Haygarth, Wickham v Haygarth* (1913) 2 Ch. 9, per Joyce, J., at p. 15 citing *Hawkins, Wills*, 2nd Ed. p. 6; *Re Patterson Dunlop v. Greer*, (1899) 1 I.R. 324.)”

*Mellor v. Daintree*, L.R. 33 Chancery Division, 198 at pp. 206 and 207, North J:—

“The first (case) is *Sweeting v. Prideaux* in which Vice-Chancellor Hall said: ‘Several cases has been referred to, but the principle which will guide me is to be found in the case of *Key v. Key*, where Lord Justice Knight Bruce said: 20

“In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.” And the same principle is to be found in the case of *Towns v. Wentworth* where Mr. Pemberton Leigh (afterwards Lord Kingsdown), said “When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if 30 the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared”’ Those are the principles which I conceive to be the law of the Court, and upon which Vice-Chancellor Hall acted then, and upon which I propose to act now. I may refer also to the observations of Vice-Chancellor Bacon 40

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10 *in Re Redfern*. He said: 'I think that upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the will. If I were to do otherwise I should be going against the canon of construction, that I am to gather the meaning of the testator from the words in which he has expressed his meaning. I am not to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it was the intention of the testator. I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor Hall expressed in *Sweeting v. Priedeaux*, that the testator must necessarily have meant what the mere letter of the will does not express.'

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20 *Jarman on Wills, 7th Ed. Vol. 3, pages 2146 and 2147, Rules XVI, XIX and XX:*

30 "XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy."

30 "XIX. That words and limitations may be transposed, supplied or rejected, where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument."

40 "XX. That words which it is obvious are miswritten (as dying *with* issue, for dying *without* issue,) may be corrected."

Compare also *Jarman, p. 561.*

*Redfield Law on Wills, 4th Ed. (Boston) 1876, Vol. 1, No. 33, pages 458 and 459:*

"1. It is an established rule in the construction of wills, that where it is evident the testator has not expressed himself as he intended, and supposed he had done, and the defect is produced by the omission of some word, or words; and where it is certain, beyond reasonable doubt, what particular words were thus omitted, they

may be supplied by intendment, and the will read, and construed, as if those words had been written in the place, or places, where they were intended to have been.”

The same at pages 460 and 461:

“3. And where it is necessary, in order to render an alternative sentence complete, and sensible, and to give effect to the apparent intent of the testator, to add certain words, found in the correlative portion of the will, it should be done. (*Doe d. v. Micklem*, 6 East, 486. See also *Webb v. Hearing*, Cro. Jac. 415, where it is said, ‘and the intention being collected, by the will, the law shall adjudge accordingly’.) And where an estate is limited to take effect over, upon a condition which never happens in the terms specified, yet, if the substance of the condition occur, the estate over shall take effect. (*Pearsall v. Simpson* 15 Ves. 29; *Malin v. Keighley*, 2 Ves. jr. 333; *Meadows v. Parry*, 1 Ves. & B. 125; *Murray v. Jones*, 2 Ves. & B. 318, 320.)”

The case referred to in this note of *Doe v. Micklem* is to be found in 102 *English Reports (King's Bench)* at page 1374. See particularly page 1376.

The same at page 462 as follows: (Particularly the citation at the end from Lord Mansfield:

“And where a devise was made to the eldest and other sons, successively, and the limitation over contains the words, ‘and likewise the several and respective heirs male of the body and bodies of such second, third, or other son, or sons, it was held, nevertheless, that it was so obvious, that the testator must have intended his eldest son to take an estate-tail, that the provision in regard to heirs, which was in terms, confined to the second and other sons, should, by construction, be extended also to the eldest son. (*Clements v. Paske*, 3 Doug. 384). And the same rule, substantially, has been applied to the construction of deeds. *Oven v. Smyth*, 2 Hen. Bl. 595. Eyre, Ch. J., here said, the case contained ‘demonstration plain on the face of the feoffment, that it was the intent of the parties that an estate-tail should’ be created in the eldest son. And still his Lordship adds, that the words used with reference to his eldest son were not sufficient for that purpose, but considers the words, ‘every such son,’ used evidently with reference to the second and younger sons, as capable of including all the sons named before. ‘But no man can read this deed,’ says his Lordship, ‘without seeing the intent I have mentioned, though by some strange blunder the usual words are

omitted.....I, for one, adhere to the rule which forbids the raising estates, by implications, in deeds, and think that we ought not to grant the same indulgence to inaccuracy in the construction of deeds, as we do in wills.' See also *Doe d. v. Martin*, 4 T.R. 39.) Lord Mansfield, in giving judgment, here said, 'In the construction of wills it is necessary to avoid two extremes. The first is that of arbitrary conjecture, for the court cannot make a will; the second, that of strictness, which in consequence of a slip in technical, or positive expression, may prevent a meaning evident and such as no man can doubt, from taking effect.' "

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Compare also *page 468, paragraph 12, and pages 468, and 469, paragraphs 15, 16, 17 and 18:*

"12. It has been often held, that where the intention of the testator is apparent, upon the whole will taken together, the court must give such a construction, as will support the intent, even against the strict grammatical construction of the words. And to effect this evident intention, as before stated, words and limitations may be transposed, supplied or rejected. (*Pond v. Bergh*, 10 *Paige*, 140). The testator's intention is to be ascertained from the whole will taken together, and not from the language of any particular provision, or clause, taken by itself. (*Hone v. Van chaick*, 3 *Barb*, Ch. 488). The testator will be presumed to have used words in his will, in their primary and ordinary signification, unless from the context, or by reference to extrinsic circumstances, it is evident he intended to use them in some secondary, or other sense, and where the primary signification of the words would render the provisions of the will insensible, absurd or inoperative. (*Cromer v. Pinckney*, 3 *Barb*. Ch. 466)."

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"15. The result of all the cases, in regard to supplying words, seems to be, that it cannot be done, unless it is clear there has been an omission, and also clear what that precise omission was. And the doctrine of the later and best-considered case is, that the omission cannot be supplied, unless the order of the different portions of the instrument, the collocation of the sentences, or something else, in the grammatical construction, affords a clear and satisfactory ground, of presuming precisely what implication is to be made. In other words, that you cannot, by mere construction, incorporate distinct provisions into the will, however certain it may be, that they were omitted by mistake; but the defects to be supplied by construction must be such as necessarily suggest themselves from the words used in connection with admissible facts, as the only reasonable and sensible meaning, deductible from the whole instrument.

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“16. The cases in the American courts, where words have been supplied, or changed, are so numerous, and follow so closely in the track of the English decisions, that we should not be justified in discussing them in detail. ‘Die without issue,’ is often read ‘Die without leaving issue,’ or ‘without issue living,’ in the American Courts. (*Moseby v. Corbin*, 3 AK. Mar. 289; *Holms v. Williams*, 1 Root 332; *McKeehan v. Wilson*, 53 Pennst. 74). 10

“17. In order to reach the obvious general intent of the testator, implications may supply verbal omissions, and all inaccuracies of grammar, or impropriety in the use of terms, may be corrected if the general purport of the instrument be clear and manifest (*Den v. McMurtrie*, 3 Green, 276). And words may be supplied, where the sense of the clause, as collected from the context, plainly requires it. (*Dew v. Barnes*, 1 Jones, Eq. 149). So words may be supplied, and the grammatical construction disregarded, in order to conform to the clear intent of the testator, as indicated by the whole will. (*Reid v. Hancock*, 10 Humph. 368; *Judy v. Williams*, 2 Carter, 449; *Jameson’s Appeal*, 1 Mich. 99; 2 Wms. Ex’rs, by Fish, 978.) 20

“18. The cases in the American reports, where ‘or’ is construed ‘and’ vice versa, are so numerous, that it would be a waste of time to state them at length under this head, as each case depends mainly upon its own peculiar facts, and will not therefore afford much guide to the decision of any other, and we shall recur to the subject hereafter. (*Post. Sec. 35*; *Butterfield v. Haskins*, 33 Me 393; 2 Wms Ex’rs. by Fish 979, and cases cited: *Brewer v. Opie*, 1 Call. 184; *Jackson v. Blansham*, 6 Johns. 55; *Holmes v. Holmes*, 5 Binn 252. The same rule is reaffirmed in the late case of *Roome v. Phillips*, 24 N.Y. 463.)” 30

Compare also Lord Esher, M.R. in *In re Harrison. Turner v. Hellard*, Law Reports, 1885, Vol. 30, (*Chancery Division*), page 390: (*Headnote*).

“A testatrix in making her Will used a law stationer’s form, which was partly in print, blanks being left in it which were to be filled up by the person who made use of it. After directing that her debts and funeral and testamentary expenses should be paid by her executrix thereafter named, the testatrix gave all her property both real and personal ‘unto to and for her own use and benefit absolutely, and I nominate, constitute and appoint my niece Catherine Hellard to be executrix of this my last will and testament’:— 40

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“Held, by Kay, J., and by the Court of Appeal, that there was an effectual gift of the residue to Catherine Hellard.

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Per Lord Esher, M.R. and Baggallay, L.J.:—For the purpose of construing a will the Court is entitled to look at the original will as well as at the probate copy.”

10 Lord Esher, M.R. at *p. 393*:

20 “In my opinion when you have to construe a disputed will you must look at the will and read it. You must use your eyes as one of the means given you to enable you to construe what people have said. The main argument in this case is founded on there being a blank in the will, and how can you tell that there is a blank without looking at the will? I know of no rule that for the purpose of constructing a will you may not look at the original will itself. Looking at the will in the present case, it is impossible not to take notice of the fact that part of it is a common form, not drawn up for the purpose of this particular will. The blank spaces were not left by the testatrix herself, but were left for the purpose of being filled up by any testator who might happen to use the form. When the form is filled up as a will it must be read according to ordinary loose English grammar and ideas. There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce, — that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule. I do not deny that this will may be read in two ways, or that it requires that a blank should be filled up. But it may be read in such a way as not to amount to a solemn farce. It is expressed elliptically. Instead of repeating the common part of several sentences, that common part is put in at the end, and the proper way to read it is to supply the common part after each sentence. Every document has to be read in this way. Here the words are, ‘I give unto, to and for her own use and benefit absolutely, and I nominate, constitute and appoint my niece Catherine Hellard to be executrix of this my will.’ Are not these words capable of being read as a gift to Catherine Hellard? No doubt the language is awkward and elliptical, but it is capable of being read in that way. I do not depart from what Mr. Justice Kay said, that the fact that this will is on a printed form, and not drawn for this particular testatrix, makes a great difference in the construction. I come to the conclusion that the testatrix intended to fill up the blank with the name of Catherine Hellard, though she has not done so. But the words are capable of being read as a gift to Catherine Hellard, and,

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applying the golden rule to which I have referred, the document ought to be read so as to make it a will, and not a blank piece of paper. As to there being any moral doubt about the meaning, no one who was not a trained lawyer would read it in any other way than as a gift to Catherine Hellard.”

Compare *Gordon v. Gordon*, *Law Reports (Eng. & Irish) (1871-72)*, Vol. 10

*V. Appeal Cases*, 254 at 283 and following, (Lord Cairns):

Particularly a quotation from Lord Cranworth:

“In order to explain more clearly the view which I take of the will, I will illustrate it by what appears to me would be an equivalent or similar devise in a shorter form: I give to my trustee Blackacre and Whitacre: as to Blackacre, in trust for my son Robert and his issue; then for my son James and his issue. And as to Whitacre, in trust for my son James and his issue; then for my son Robert and his issue. And in default of all the issue of my sons Robert and James, then in trust for my daughter. 20

In my opinion, the devise over to the daughter thus expressed is ambiguous. It may refer to Whitacre alone, or it may include both Blackacre and Whitacre. It is possible, and it may be conceded, that the former construction is the more grammatically accurate; but few testators do — certainly this testator did not — conform rigidly to the rules of correct writing. It is possible that in reading the words of the devise a particular meaning may be to some extent impressed on them by intonation or pause; but that is only another way of expressing that words found in a writing which is itself mute and without break or stops can be legitimately made to bear two meanings. 30

If the devise I have supposed may be taken, as I think it fairly may, to be an equivalent or reproduction in a shorter form of that in question in this appeal, and if I am right in saying that it is open to two constructions, we must resort to every part of the will in order to ascertain which construction is in this case to be preferred. 40

I take the law on this subject to have been expressed with much accuracy and felicity by Lord Cranworth, than whom no Judge more consistently adhered to sound and strict principles of construction in the interpretation of wills. In the case of *Abbott v. Middleton* before this House Lord Cranworth speak thus: ‘Where

10 by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable.

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20 I may observe that in the particular clause of this testator's will on which the question arises, there are in the form of the clause itself symptoms that it is not intended to be merely a sequel of the clause immediately preceding. It does not run 'in default of such issue female of my son Robert,' which would leave the mode of connection similar to that used by the testator in the previous limitations of Delamont, but 'in default of all such issue male and female of all the sons and daughters of my said sons Robert and James,' as if the testator were now taking a comprehensive view of all he had previously given to Robert and James and their issue. The words 'in trust' are introduced, and not merely 'to the use'; and the order in which the names of the sons are given would not tally with the order in which Delamont alone was to be enjoyed."

30 Compare *Smith and Ready (1927) 3 D.L.R. 991*, where the Court changes words to accomplish a purpose similar to that now contended for and refers to a line of English cases in support of a construction which would prevent the defeat of the expectations of an entire class and that would carry the gift to a remoter generation if that seemed more consonant "with the truth and honour of the case".

See citation *at page 993* and following:

40 "Were one to read the words used by the testator and attempt to attach a meaning in the light of the events that have happened, only one meaning could be given to them. If Joshua Smith died without leaving lawful heirs, using the words 'heirs' in the sense of 'children' or 'descendants,' the testator unquestionably meant that in that event this farm was to go to his (the testator's) remaining children or their heirs, i.e., descendants.

Before discussing this further, I think it expedient to ascertain as best I can the real meaning of the rule and its limitations.

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Although referred to as the rule in *Maitland v. Chalie*, the rule really had its origin much earlier. Possibly it might more aptly be described as the rule in *Woodcock v. Duke of Dorset (1792)*, 3 Bro. C.C. 569, 29 E.R. 704. There Thurlow, L.C. was confronted by a difficulty upon a marriage settlement. The estate was settled upon spouses for life, and if they 'should leave, at the death of the survivor ... any child or children of their two bodies begotten,' then for the benefit of the child or children. The surviving spouse was long-lived, and in the meantime a child had been born and had died, leaving children. The suggestion was made that this child having died during the lifetime of its parents its issue would take nothing, and the gift over would take effect. The result shocked the conscience of the Court, and the Lord Chancellor when reserving judgment remarked upon the possibility of the settlors upon a marriage settlement such as this making provision for children and limiting that provision to the case of children who survived the parent but its extreme improbability, and, at p. 571, added the most significant remark: 'Though the words are strong and difficult to manage, the intention of the settlement is the truth and honor of the case,' and after more than two years' meditation, without giving reasons, he gave judgment in accordance with the truth and honour of the case. To the report of this case in 29 E.R. 704, the editor adds a footnote (p. 705) stating that:— 'This seems to be the strongest decision upon the subject, in opposition to words so "difficult to manage" as were here used: and Lord Eldon, C., has repeatedly stated that it can only be maintained upon the (certainty that the Court attained) the clear intention of the parties.'

*Maitland v. Chalie, 6 Madd.*, was a decision of Leach, V.C., upon a will. The provisions of the will were complicated. There was (p. 250) 'a clear vested interest in the first place given to the children of a daughter attaining twenty-one', and there was later a provision giving the property over if the daughter should die leaving no children. The children of the daughter had predeceased her, leaving issue. The Vice-Chancellor, on the authority of *Woodcock v. Duke of Dorset*, supra, decided that he could read the word 'having' for 'leaving' so then 'the whole will will express a consistent intention.'

"Since then innumerable cases have been decided in which this rule is referred to and acted upon. In all these cases the rule is relied upon as an instruction to give effect to the intention or what is presumed to be the real intention of the testator or settlor. That intention has generally been found to exist by reason of a recital in a settlement or from something in a will from which it is inferred



10 that the settlor or testator has the intention of benefiting the issue of a particular individual. In very many of the cases the expression used in the gift is 'child or children,' and the gift over is in default of leaving any such child or children. It is then pointed out that if the original donee had had several children, and all but one should die in his lifetime, the gift over could not take effect, and that in such case, according to many authorities, the fund must be divided per stirpes between the surviving child and the issue of the dead children. It is thought to be extremely unlikely that the testator should intend to defeat the expectations of the entire class by the mere accident of the last living child predeceasing the life-tenant. Such an intention, although possible, has been described as so capricious and absurd as to be almost unthinkable (per Cotton, L.J. in re Ball, Slattery v. Ball, (1888), 40 Ch. D. 11; Barkworth v. Barkworth (1906) 75 L.J. Ch. 754.)

20 "In the case of White v. Hill (1867), L.R. 4 Eq. 265, the decision of Page Wood, V.-C. is particularly illuminating. During the course of the argument the Vice-Chancellor had said (p. 267):— 'The prima facie meaning of 'leaving' is "leaving at the death". The Courts have said that "leaving" may mean "having"; but it would be much more difficult to turn "leaving at the time of her decease" into "having" than "leaving" simply. In the course of the judgment (pp. 270-1) he says:— "Leaving" is a word that may be construed, in its primary sense, as leaving on the decease of the person to whom the word applies; but it has been construed as

30 "having", rather than that a child shall be deprived of a vested interest which seems to have been made as a provision for it. It is true that the remark was made in Bythesea v Bythesea (1854), 23 L.J. (Ch.) 1004, (per Turner, L.J., at p. 1006), that "The existence of marriage settlements per se, proves an intention to provide for children generally, but a will is arbitrary in its nature, and such may be, or may not be, the intention. In both cases, the question is one of intention; and in a will so framed as to shew an intention to provide for children the principle may be properly applied"..... It was

40 observed in Bythesea v Bythesea that, under a will so framed, a child just born might take a share and die, and it may be supposed that a testator would not be desirous of giving anything to a person having so brief an existence. But it does not strike me that that observation has very great force; for this reason, that in such case the provision made for the family takes effect. It is true the share would go to the child's father, as heir-at-law, as the law now stands; but still, that is a provision made for the family; and the real question is this, does the testator, in carefully providing for his child A. with a portion of his fortune, desire that portion to be taken away from the descendants of A. and go over to another branch of the family? In

settlement the Court has held that that was not the intention, but that the intention was to provide for the families of the several children. In this case, if I were to hold that there is a gift for life, and then, on the death of the tenant for life without leaving a child, a gift over, although there may be remoter issue living, I should be erring against the rule.' ”

Compare also the judgment of the Ontario Court of Appeals in *re Cooper*, 14 D.L.R. 172 (lower court judgment reported in 13 D.L.R. 261), where the word “children” is supplied after the word “nephews” to direct the benefaction. See page 174 as follows:—

“The facts are very few and uncomplicated. The testator was unmarried. He left two brothers surviving, namely, Barry S. Cooper and William F.S. Cooper. Barry S. Cooper had eight children, of whom three were females and five males. William F.S. Cooper, so far as appears, was unmarried. The testator also left other nephews and nieces to the number of more than eight, but the exact number is not stated — the children of deceased brothers and sisters. The testator was apparently well disposed towards his brother Barry S. Cooper, to whom he left in his will a substantial bequest.

“The contention of the appellants is, that the Court should, under these circumstances, supply the word ‘children’ after the word ‘nephews’ to make the clause read ‘my three nieces and five nephews, children of Barry S. Cooper.’ And with that contention I entirely agree.

“That the Court has power in a proper case to supply a missing word cannot be disputed. The rule is stated in many cases: among others by Knight Bruce, L.J., in *Pride v. Fooks*, 3 DeG. & J. 252, at p. 266, in these words: ‘Again, all lawyers know that if the contents of a will shew that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfill the intention with which the document was written, the addition or rejection will by construction be made.’

“Similar remarks by the same learned judge occur in the earlier case of *Key v. Key*, 4 DeG. M. & G. 73, at p. 84, 43 Eng. R. 435, at 439. See also *Mellor v. Daintree*, 33 Ch. D. 198; *Re Holden*, 5 O.L.R. 156, at p. 162.

“The Court must, of course, first be satisfied from the language of the will what was the real intention of the testator; for it is only to give effect to such intention that the implication can be made.

10 “In the present instance, upon the facts, the matter does not, it appears to me, admit of a reasonable doubt. The testator had some eighteen or more nephews and nieces. Out of these be selected as the special subjects of his bounty in the clause in question, three nieces and five nephews—exactly the number and description of the children of his brother Barry S. Cooper; and he coupled with the gift — for some purpose, it must be assumed — the name, not of his other surviving brother, who had no children, but of his brother Barry S. Cooper; a conjunction absolutely meaningless unless the word ‘children’ is to be supplied, as the appellants contend.”

In the  
Court of  
King's Bench  
—  
No. 4  
Appellant's  
Factum  
12 June 1937  
(Continued)

*In re Smith's Trusts referred to at page 497 of the report of In re Sibley's Trusts, L.R. 5 Ch. D. (1877) 494:*

20 Jessel, Master of the Rolls, was the Judge in each case. In the first case the will read thus:— *At page 497:*

“If Sarah Smith should have any money at her death, she wishes it to be equally divided amongst her brothers and sisters after all expenses are paid. Should any of her brothers or sisters be dead, their share is to be equally divided amongst their children. If no children be living, the money to be divided amongst the surviving brothers and sisters of Sarah Smith. I leave my sister Hannah Arnold, née Smith, my sole executrix to settle all my affairs.”  
The judgment was as follows:— *At page 498:*

30 “The question is, whether I am to attribute to this testatrix the capricious intention that, if a brother died before her will, his children should not take, but that, if a brother died after her will, his children should take. I am of opinion that I am not bound to do anything of the sort. She gives her money to be equally divided amongst her brothers and sisters, and then she says, ‘should any of her brothers and sisters be dead, their share is to be equally divided amongst their children.’ The words ‘their share’ cannot mean a share given to a brother or sister who is dead, because you cannot give a legacy to a dead person as the testatrix must have known; and consequently ‘their share’ must mean ‘the share which they would if living have taken.’ Therefore I hold that the children of the brother who was dead at the date of the will are entitled to a share.”

40 That “heirs” would mean children may be supported from *ex parte Dame Allison, 51 S.C., 188 at page 190* where McLennan, J. says:—

“The primary meaning of the word ‘family’ in a will is children, and there must be some circumstances, either in the will or in

the situation of the parties, to prevent that construction.”

How far the Court may go is illustrated in *White v. Scoles*, *The Law Times Reports*, Vol. LXXX, 701 at page 702:—

“Will — Misdescription — Latent Ambiguity — Extrinsic evidence — Previous wills — Admissibility. 10

“A testator by his will, dated in July 1896, bequeathed ‘to such of the daughters of my late friend Ignatius Scoles, deceased, as shall be living and unmarried at my decease, legacies of one hundred pounds each.’

“It appeared that Ignatius Scoles was a Jesuit priest and unmarried, and was living at the time the will was made. He had several unmarried sisters, all being children of Joseph John Scoles, who had died in 1863, and was scarcely known to the testator. The sisters of Ignatius Scoles claimed the legacies on the ground that the testator had made an obvious mistake; and they relied on the evidence of certain previous wills as showing that they were in fact the persons whom the testator intended as objects of his bounty. 20

“Held, affirming the decision of Kekewich, J., that the previous wills were admissible in evidence; and, reversing his decision, that the ladies were entitled to the legacies.”

“Lindley, M.R. I cannot bring my mind to agree with the decision of Kekewich, J., in this case. I have not the slightest doubt as to the true meaning of the language of this will. (His Lordship read the bequest above set forth, and continued;) It so happens that at the date of the will there was no person answering to the description of ‘daughter of my late friend Ignatius Scoles’, as Ignatius Scoles was living at the date of the will and had no daughters, and could have none, he being a Roman Catholic priest. Assuming that the language of the gift fits no one, what is to be done? We must cast about and see who, if anyone, was known to the testator whose name could have been my mistake put as Ignatius. The name ‘Ignatius, is not an insuperable difficulty. We find that there was a gentleman of the name of Scoles, Joseph John, who was the father of Ignatius; that he had a number of daughters; that the testator had resided at his widow’s house for some years; and that he knew the daughters of Joseph John Scoles, and might have known Joseph John himself. At all events there is a class of persons who might be fairly described as daughters of one Scoles who was deceased, and it is shown by a former will that the testator knew of these ladies, 40

and in that will he left a legacy to each of them, and described them by the more accurate description of 'daughters of the late Mr. Scoles, architect, who formely resided at Crofton Lodge, Hammersmith.' What are we to do? Are we to say that because there are no persons who answer the description used in the present will, 'daughters of my late friend Ignatius Scoles', we cannot find out by legal methods who were the persons meant by the testator? I have not the slightest doubt that, not only according to the authorities, but also according to common sense, when we find that the description will not apply to anybody, and that the alternative is that the gift fails, we must try to find out who was meant. I think that the decision of the learned judge in the Court below proceeds with too much caution. He thought that it would be guessing to put in the name of Joseph John Scoles instead of Ignatius. But I do not think that it would when it is shown that he is the man whose daughters were intended to take. The order of the learned judge must be reversed so far as it declares that the daughters of Joseph John Scoles are not entitled to these legacies. The appeal must therefore be allowed, the cost to come out of the estate."

In the  
Court of  
King's Bench  
No. 1  
Appellant's  
Factum  
12 June 1937  
(Continued)

"Sir Francis Jeune.—I entirely agree with the judgment just delivered by the Master of the Rolls. It appears to me that this is a very simple case; and, indeed, I am surprised that it is not still more simple, because I should have thought it an extremely likely thing that the persons interested would apply to the Probate Court on granting probate to leave out the word 'Ignatius'. If that had been done, I am very much inclined to think that that application would have been successful, and that the word 'Ignatius' would have been left out as having been inserted by mistake. Then the gift in the will would have run 'daughters of my late friend — Scoles', and there could not in the circumstances have been any dispute about the meaning of that. But even as the matter stands it appears to me that this case is clear. The evidence which has been let in was admitted, in accordance with the very well-known principle of law that when you have to construe a document you are entitled to look at the surrounding facts. When you look, as you are entitled to do, at the surrounding facts, you find that there is no class of persons in existence who could have been correctly described as "the daughter of my late friend Ignatius Scoles'. Such a class of persons does not exist. But you find that there is a class of persons consisting of the daughters of Joseph John Scoles, and that Joseph John Scoles was, or may have been, properly described as the 'late friend' of the testator. Those daughters, at any rate, are persons whom the testator knew and regarded in at least a friendly spirit; and, having regard to those facts, it appears to me that there is no difficulty in

applying the description, though it is an inaccurate description, to the daughters of Joseph John Scoles.”

“Romer, L.J. — I agree.”

See also *Oddie vs Woodford*, 3 *My. and C.R.* 584 at 614 and 40 *Eng. Rep.* 1052 at 1063. 10

“Now I take it to be one rule in the construction of a will that you are not to impute to a testator unless the context requires it, that he uses additional words except for some additional purposes; that you are not to suppose he uses additional words for no purpose.”

This case was followed by the Supreme Court in *Re Tyhurst*, 1932 *S.C.R.* 713 at 717:—

“It cannot be denied that the words ‘legacies’ and ‘bequests’ are indiscriminately used in testamentary dispositions to mean gifts of personal property. A testator, however, is entitled to use them to extinguish donations to different classes and his intention will be given effect to provided he has made it clear what his intention was. As has often been said, a will ought as far as possible to be its own dictionary. In determining whether the testator used ‘legacies’ and ‘bequests’ as synonomous terms or as specifying gifts to different groups, we must bear in mind the canon of construction laid down by Lord Cottenham in *Oddie v. Woodford*: 20 30

‘Now I take it to be one rule in the construction of a will, that you are not to impute to a testator, unless the context requires it, that he uses additional words except for some additional purpose; that you are not to suppose he uses additional words for no purpose.’

“Turning now to what may be called the plan of the will, it will be seen that the testator has made three classes the objects of his bounty: first his wife; second the four personal legatees, each of whom was a relative or friend and third the charitable beneficiaries. His gifts to the latter two classes were to take effect only after the death of his wife. Contemplating, or, to use the term employed by Blackburn J. in *Grant v. Grant*, ‘soliloquizing’ as to what distribution he would make of his property after the death of his wife, the testator directs his executors to pay to the beneficiaries, both individual and charitable, the specific sums above set out. These amounted to \$2,500 for the four individuals and \$4,600 for the 40

charitable bequests. His property at the time was worth in the neighborhood of \$55,000, so that, after payment of these specific gifts, there would be to dispose of a residue of some \$48,000. This he disposes of in clause 5 by providing that, after the payment of the 'legacies' and 'bequests' made herein, all the money remaining shall be paid to the 'said legatees'. Here he designates the specific sums which he directed to be paid as 'legacies' and 'bequests', and it is contended for the appellants that, by doing so, he was making a distinction between the two terms and applying 'legacies' to the payments made to the four individuals (who may be referred to as Group 1), and 'bequests' to the charitable beneficiaries (who may be said to constitute Group 2).

In the  
Court of  
King's Bench  
No. 4  
Appellant's  
Factum  
12 June 1937  
(Continued)

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20

"It will be observed that in clause 5 the testator uses the terms legacies and bequests no less than three times. If these words meant, to his mind, exactly the same thing, why use the two words? And why repeat them? It is said that one must be considered as surplusage, but words are only to be treated as surplusage when the will or the circumstances to which we are entitled to look satisfies us that the testator could not have been making a distinction between them. In the light of the testator's use of the two words it may not be unimportant to ask if it is not more in accordance with the prevailing custom to refer to gifts to charity, as charitable bequests, rather than as charitable legacies?"

30 Compare also *in Re Fulton*, 15 O.W.N., 220.

(d) Compare *Mignault*, Vol. 3, page 255:—

"IV. Toutes les successions, quelle que soit leur nature ou l'origine des biens, sont régies par les mêmes règles. — Je dois maintenant expliquer la disposition la plus importante de ce titre, sous le rapport des changements apportés au droit ancien. Elle est en ces termes :

40

599. 'La loi ne considère ni l'origine, ni la nature des biens 'pour en régler la succession. Tous ensemble ils ne forment qu'une 'seule et unique hérédité qui se transmet et se partage d'après les 'mêmes règles, ou suivant qu'en a ordonné le propriétaire' (a).

Dans notre ancienne jurisprudence, la dévolution des biens se réglait, au contraire, d'après leur nature et leur origine.

D'après *leur nature*, les biens étaient nobles et roturiers, meubles ou immeubles, et attribués, suivant, ces distinctions, à tels ou tels héritiers.

D'après *leur origine*, les biens étaient *propres* et *acquêts*. On rangeait dans la classe des biens *propres*: 1o tous les biens que le *de cujus* avait reçus par succession légitime; 2o les biens qu'il détenait par donation ou legs, de l'un de ses parents en ligne directe. Tous les autres biens étaient *acquêts*. Les propres mobiliers étaient assimilés aux *acquêts* et régis comme eux.

Tels parents succédaient aux *acquêts*, qui ne succédaient pas aux *propres* et réciproquement.”

10

“(a) Cet article, bien entendu, est le droit nouveau. L'article préparé par les codificateurs, comme énonçant la règle du droit ancien, se lisait comme suit :

‘En fait de successions les biens se divisent :

20

1o ‘En biens meubles et en biens immeubles;

2o. ‘En propres et en *acquêts*;

3o ‘En propres naissants et en propres anciens;

4o. ‘En propres paternels et propres maternels;

5o ‘En propres de ligne et en propre sans ligne.

‘Ces diverses espèces de biens sont sujettes à différentes règles qui sont exposées ci-après dans le présent titre.’

30

Jusqu'au mot ‘*succession*’ inclusivement l'article 599 est la copie textuelle de l'article 732 du code Napoléon placé, je l'ai dit, dans le chapitre III de ce titre.”

*Compare Mignault, Vol. 3, page 309:*

“622. ‘En ligne collatérale la représentation est admise dans le cas seulement où des neveux et nièces viennent à la succession de leur oncle ou tante concurremment avec les frères et soeurs du défunt.’”

40

Donc, les neveux et nièces seuls bénéficient de la représentation. Les descendants de ces neveux et nièces, les petits-neveux ou petites-nièces, ne peuvent représenter leur grand-père ou grand-mère à la succession de leur grand-oncle ou grand-tante. Dans notre droit l'affection de l'oncle ou tante n'est pas censée s'étendre plus



loin que les neveux et nièces; si le *de cujus* veut que ses petits-neveux ou ses petites-nièces viennent à la succession, il n'a qu'à faire un testament qui leur reconnaisse ce bénéfice."

In the  
Court of  
King's Bench  
—  
No. 4  
Appellant's  
Factum  
12 June 1937  
(Continued)

*Compare Mignault, Vol. 3, page 328:—*

10 "V. LIMITE DE LA SUCCESSIBILITE. — On conçoit qu'il faut poser une limite au-delà de laquelle la successibilité ne sera pas admise. La succession des parents quand elle est déférée par la loi, en l'absence de dispositions testamentaires du défunt, est fondée, je l'ai dit, sur une présomption d'affection, et l'affection ne dépasse pas un certain degré de parenté. Ce n'est qu'en matière de successions collatérales, cependant qu'il était besoin d'en parler, car comme la mort saisit le vif, il n'était pas à craindre qu'un descendant ou ascendant trop éloigné appréhendât la succession."

20 *also LA THEMIS, Vol. 1 (1879), pages 22 and 28:— (T.J.J. Loranger)*

"Parmi les modifications faites par le Code Civil du Bas-Canada à l'économie de notre ancien droit, une des plus radicales a sans doute été celle opérée par l'article 599 ainsi conçu: 'La loi ne considère ni l'origine ni la nature des biens pour en régler la succession. Tous ensemble ils ne forment qu'une seule et unique hérédité, qui se transmet et se partage d'après les mêmes règles, ou suivant qu'en a ordonné le propriétaire.'

30 L'effet de la première disposition de cet article a été d'abolir la distinction entre les biens propres, acquêts et conquêts, c'est-à-dire de supprimer l'affectation des biens propres à la famille dont ils descendent, et la seconde, dans la pensée des Codificateurs, a été le complément de la liberté des testaments décrétée par le statut impérial de 1774, appelé l'Acte de Québec, confirmé par notre statut provincial de 1801. En d'autres mots, l'objet de l'article entier a été d'appliquer à la succession testamentaire et à la succession légitime, un même et unique principe d'hérédité, de retrancher du partage des successions légitimes, au cas de concours de plusieurs lignes, les préférences des parents sur les biens provenant de leur ligne, de  
40 faire des biens successifs une seule masse et de tous les successibles une seule famille, se divisant les biens par portions viriles.

L'article 599 eut donc pour effet de faire disparaître de la succession *ab intestat*, les restrictions que l'Acte de Québec et le Statut de 1801 avait effacées du testament et de soumettre la dévolution testamentaire et la transmission légitime à un même principe."

“C'est dans l'application de la règle fameuse ci-haut citée, *paterna paternis, materna maternis*, que se trouve la théorie de la succession des propres.”

In the  
Court of  
King's Bench  
No. 4  
Appellant's  
Actum  
2 June 1937  
(Continued)

Compare also *Doré vs. Brosseau*, 13 K.B., 538 at p. 547, where the late Mr. Justice Hall speaking for the Court and referring to the doctrine of representation says:—

10

“It is clearly limited by the articles of our Code 829 and 937, and the comments of the codifiers, to the cases of intestate succession, and based upon the supposition of what would have been the wish, according to natural affection, of a deceased person who made no will, but it has no application to cases like that under consideration in which the deceased was not content to have his estate divided according to the natural laws of inheritance, but took the pains to express by a formal testament what were his special wishes as to such distribution.”

20

*Jarman*, Vol. 1, page 465, footnote (f):—

“(f) 11, East, 441. See *Hughes v. Turner*, 3 My. & K. 666, where Sir C. Pepys, M.R. held that a revoked will could not be looked at for the purpose of influencing the construction of the subsequent unrevoked instrument. See also *M'Leroth v. Bacon*, 5 Ves. 165; *Randall v. Daniel*, 24 Bea. 193. These cases must be distinguished from those in which a revoked will can be referred to for the purpose of correcting a mistake in the description of a legatee, etc., post, p. 488. But a revoked clause in a will cannot affect the construction of an unambiguous codicil: *Choa Eng Wan v. Choa Giang Tee*, (1923) A.C. 469.”

30

*Halsbury*, *verbo Wills*, pages 650 and 651, Nos. 1255 and 1256.

“1255. The instructions of the testator for the preparation of his will cannot be given in evidence to prove his intentions, except in the cases named where evidence of intention is admissible, but may be admitted in any case as evidence identifying the donee and not as evidence of intention.”

40

1256. Similar considerations apply to revoked wills, a draft of the will, letters, papers or sayings of the testator. Documents other than the will cannot be referred to for the purpose of affecting the construction of the will, except where they are admissible in evidence under the above rules or are expressly referred to in the will.”

Respondent's Factum

10 This is an appeal from a judgment of the Superior Court rendered by Chief Justice Greenshields on the 3rd April, 1937, dismissing the plaintiff's action, which was instituted by a "joint factum or case" under article 509 of the Code of Civil Procedure.

THE FACTS

20 Dame Elspeth H. Meredith (Mrs. Charles Meredith) died at Montreal on the 24th June, 1936, leaving as her last will a holograph will (Exhibit No. 1 Joint Record page 11) which contained the following provision with regard to her residuary estate: (Joint Record, page 12, line 8).

"The rest of my estate to be divided equally between my brothers and sisters or their immediate heirs, including my sister Edith's family, and between my husband's Charles Meredith's nieces and nephews (immediate heirs)".

30 The respondents Mrs. Thorburn, Mrs. Peters, Miss Mary Meredith, John Stanley Meredith and Thomas Redmond Meredith and the late Edmund Meredith, junior, (who died 5th August, 1936) were the only nieces and nephews of the late Charles Meredith who survived his widow, the testatrix. The appellants are grandnieces and grandnephews of the late Charles Meredith, and are sons and daughters of nieces or nephews of Mr. Meredith who had predeceased his widow, the testatrix, and they are the only such grandnieces and grandnephews who survived her.

40 The question of law submitted by the "joint factum or case" is whether the respondents are the only residuary legatees to whom the testatrix bequeathed one-half of her residuary estate to be divided "between my husband's Charles Meredith's nieces and nephews (immediate heirs)" or whether the appellants are also entitled to share as residuary legatees par souches as representing their parents who were nieces and nephews of Charles Meredith and who had predeceased his widow, the testatrix.

JUDGMENT APPEALED FROM

The respondents submit that the judgment appealed from is well-founded in law, on the facts admitted by the parties, as is shown by the following extracts from that judgment:

In the  
Court of  
King's Bench  
No. 5  
Respondent's  
Petition  
5 May 1937  
(Continued)

(a) The contentions of the parties are described as follows (Joint Record, page 29 line 22):—

“With much emphasis the learned Counsel for the plaintiffs urged, that the Testatrix meant and intended by the words ‘immediate heirs’, the immediate heirs of a nephew or a niece of Charles Meredith. In other words, that the Testatrix provided for a representation in favor of the children of a nephew or niece, being grand-nephews or grand-nieces of the deceased, Charles Meredith and of the Testatrix. 10

“Defendants’ Counsel, on the other hand, with equal emphasis and vigor, asserts, that the Testatrix used the two words ‘in brackets’ for the sole purpose of identifying or describing the legatees intended by her to benefit by her will.”

(b) The legal principles to be applied are described as follows (Joint Record page 21, line 25):—

“If and when the words found in a testamentary document are given the usual ordinary meaning and no ambiguity arises, then the plain duty of the Court is to give effect to the words used.”

(Joint Record page 22, line 12):—

“A better rule cannot be found than that laid down in many cases in the Court of this Province and this Dominion, as well as in English cases, and that rule is expressed in this way: 30

“The Courts do not determine what a testator intended to say, but what the testator intended by what he did say; what he intended by the words used in giving expression to his intention.”

“This leads to the further statement, that no Court is competent to make a Will for a deceased person, or to remake or modify, detract from or add to such a Will. The limit of the Court’s function is, to determine the true construction or interpretation of the Will; to determine the intention of the testator by all available legal means, particularly by a consideration of the whole testamentary document and the words therein employed or used by the testator, and when that intention is found, the Court must give it full force and direct and decree the complete carrying out of the wishes of the deceased person. In other words, the enforcement of the complete execution of the Will.” 40

(Joint Record page 28, line 7):—

“So far as the law of this Province is concerned, there is no  
“doubt that a bequest to ‘nephews and nieces’ excludes grand-ne-  
“phews and grand-nieces.”

In the  
Court of  
King's Bench  
—  
No. 5  
Respondent's  
Factum  
15 May 1937  
(Continued)

(c) (Joint Record page 31, line 1):—

10

“It follows that if the plaintiffs (appellants) are to succeed,  
“an addition must be made to the words used by the Testatrix and  
“words must be added to those used by the Testatrix. In dealing with  
“the Angus bequest the Testatrix chose and used the words which  
“the plaintiff ask the Court to add to the words used by the Testatrix  
“in dealing with the bequest to the Meredith family. The Court is  
“urged to do this in order that the plaintiffs may succeed in their  
“claim as by them made. If, as stated by the learned Counsel, the  
“words in brackets are completely meaningless unless supplemented  
20 “by some word or words the plaintiffs cannot succeed without the  
“Court adding the words suggested by their Counsel. On the other  
“hand, the words ‘immediate heirs’ have a distinct legal meaning, and  
“they may well be accepted as descriptive of legatees whose names  
“were not mentioned and were not otherwise identified than as being  
“the nephews and nieces of Charles Meredith. .... The submission of  
“defendants (respondents) further find support in the fact, that the  
“Testatrix made use of words in brackets to indicate or describe  
“or identify persons who were the object of her generosity; for  
30 “example, we find this — To my niece, Peggy, daughter of my  
“ ‘brother D. J. Angus (Victoria, B.C.)’ Again, as already men-  
“tioned,—‘To my god-child, Adelaide Cooley, (daughter of Dr. E.  
“ ‘M. Eberts),’ Clearly, words manifestly used for the purpose of  
“describing or identifying the beneficiary.

20

30

“I dispose of this aspect of the matter with the statement,  
“that I will not add any words to the Will of the Testatrix. I am  
“able to find in the words used by the Testatrix a sufficiently  
“clear expression of her testamentary intention and wishes.”

40

(d) (Joint Record page 33, line 8):—

“And it is by this judgment declared, that one half of the  
“residuary estate of the late Mrs. Elspeth H. Meredith was by her  
“holograph Will divided into six equal parts, which were bequeathed:  
“one part each to the defendants Mrs. Isabel Magdalen Thorburn,  
“Mrs. Constance M. Peters, Miss Mary Meredith, John Stanley Me-  
“redith, Thomas Redmond Meredith, and one part to the late  
“Edmund Meredith, Junior, and that the said half of the residuary  
“estate be paid and distributed accordingly.”

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## THE ARGUMENT

The Respondents respectfully submit:

FIRST: That the legal principle to be applied in the present case is for the court to give the fair and literal meaning to the actual language of the will. 10

SECOND: That the fair and literal meaning of the language used by the testatrix in the present case is as contended for by the respondents, namely: that one-half of her residuary estate goes to the respondents as the nieces and nephews of her late husband, Charles Meredith, and that the appellants as his grandnieces and grandnephews do not share therein.

THIRD: That the use by the testatrix of the words "immediate heirs" in brackets following the words "Charles Meredith's nieces and nephews" was intended by her as descriptive of those "nieces and nephews" as being among Charles Meredith's immediate heirs. 20

FOURTH: That the courts cannot add to the will the words which the appellants contend should be added, so as to make the provision in question read:

"and between my husband's Charles Meredith's nieces and nephews or their immediate heirs, including the family of his nephew J. R. Meredith and the family of his niece Maud Ramsay." 30

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FIRST: *The legal principle to be applied in the present case is for the court to give the fair and literal meaning to the actual language of the will.*

*Auger vs. Beaudry, 48 D.L.R., 356 (Privy Council, 1919), Lord Buckmaster, page 359:*

40  
"But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean."

*In re Browne*, 1934, S.C.R., 324, Rinfret, J. (for the Supreme Court of Canada) page 330):—

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10 “It is unnecessary to repeat that the golden rule, the funda-  
“mental principle whereby the courts must be guided in the inter-  
“pretation of testamentary documents, is that effect must be given  
“to the testator’s intention ascertainable from the expressed language  
“of the instrument. So far as possible the will itself must speak.....  
(page 331) Each will must be construed according to the apparent  
“intention of the testator (Williams on Executors, 12th ed., p. 726).  
“While the well known rules or the decided cases are no doubt help-  
“ful in ambiguous matters or in affording illustrations, ‘in every  
“‘case it is the testator’s intention, if it can be gathered from the  
“‘will, which must govern.’ ”

20 *Goldstein and Montreal Trust Company*, 31 K.B., 157 (1920), Mar-  
tin, J. (for the Court of Appeal) page 159:—

30 “It is perhaps common place to remark that the rule in con-  
“struing a will is not to venture into conjecture but to find out the  
“intention of the testator from the terms of the will and surround-  
“ing circumstances. The question is not what he intended to say  
“but what is intended by what he did say. We cannot make another  
“disposition for the testator nor substitute our judgment for his.  
“We must interpret to the best of our ability the disposition made  
“by him and give effect to the testator’s intention as disclosed by the  
“words which he used.”

Tellier, J., page 164:—

“En tout cas, la volonté clairement exprimée du testateur doit  
“faire loi pour le tribunal.”

40 SECOND: *The fair and literal meaning of the language used by  
the testatrix in the present case is as contended for by the respondents,  
namely that one-half of her residuary estate goes to the respondents as  
the nieces and nephews of her late husband, Charles Meredith, and that the  
appellants as his grand-nieces and grand-nephews do not share therein.*

It is important to bear in mind in this connection that under article  
872 of the Civil Code of the Province of Quebec:

“The rules concerning legacies and the presumptions of the  
“testator’s intention, as well as the meaning ascribed to certain  
“terms, give way to the formal or otherwise sufficient expression

“of such intention, given in another sense or with a view to different effects.”

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and the respondents submit that the wording of the provision in question in the will constitutes a “formal or otherwise sufficient expression” of the intention of the testatrix, although in fact she does not depart from the ordinary legal rules regarding representation in the case of collaterals. 10 The wording is clear and unambiguous, being as follows:

“The rest of my estate to be divided equally between my brothers and sisters or their immediate heirs including my sister Edith’s family and between my husband’s Charles Meredith’s nieces and nephews (immediate heirs)”.

It is admitted by the parties (Joint Record page 4, line 8) that “at the time of her death, the estate of the late Dame Elspeth Hudson Angus (Mrs. Meredith) was of the gross value of about \$2,500,000.00, and was 20 derived approximately as to one-half from the estate of her late father R. B. Angus, and one-half from the estate of her late husband Charles Meredith.”

The testatrix was carrying out a natural desire to bequeath to representatives of the Angus family the half of her residuary estate which had come from her father, R. B. Angus, and to bequeath to representatives of the Meredith family the other half which had come from her husband, Charles Meredith. In the latter case she used the words “my husband’s Charles Meredith’s nieces and nephews”, and in the former case she used 30 the words “my brothers and sisters”. Both expressions are entirely clear and free from ambiguity, and it cannot be contended that the words “Charles Meredith’s nieces and nephews” would include any grandnieces or grandnephews.

*In re Cozens*, L.R. 1903, 1 Chancery, page 138. Swinfen Eady, J., page 141:

“The question raised by this summons is, Who are the persons 40 entitled to share in a bequest made by Catherine Cozens by her will dated January 18, 1886, ‘unto and among all my own nephews and nieces’? ..... (page 144) In my opinion, the expression ‘my own nephews and nieces’ in this will restricts the class to persons who are the lawful nephews or nieces of the testatrix, of the whole or half-blood, to the exclusion of great-nephews or great-nieces of the testatrix, nephews or nieces of her husband, a daughter of an illegitimate son of a sister of testatrix, and all other persons, though some of



“them may have been inaccurately referred to in some other part  
“of the will as ‘my nephew’ or ‘my niece’.”

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*Blower's Trusts*, L.R. 6, Chancery Appeal Cases, 351 (1871)  
The clause in the will contained the following:—

10                   “.....upon trust to pay and divide the remainder of the  
“trust moneys unto and between my great-nephew George William  
“Wilson and to such other of my nephews and nieces as shall be  
“living at mine or my said sister's decease, in equal shares and pro-  
“portions”.

Reversing the Vice Chancellor Sir W. M. James, L.J.:— (page 353):

20                   “It was not denied in the argument before us that the words  
“‘nephews and nieces’ naturally and ordinarily mean the children  
“of a brother or the children of a sister, and that they do not include  
“more remote descendants. But it was said that we have here, in  
“the testator's own words, a plain indication that he intended, by the  
“description of ‘nephews and nieces’, to include great-nephews and  
“great-nieces, and that this is made clear by the words ‘such  
“other.’”

(page 355):

30                   “Therefore we are obliged to differ, with the greatest  
“possible respect, from the opinion of the Vice-Chancellor. We  
“determine the case simply upon the words of the will with refer-  
“ence to the authorities that were cited to us, that ‘nephews and  
“‘nieces’ means nephews and nieces unless there be something  
“which makes it clear that some other meaning is attached by the  
“testator to the words.”

Sir G. Mellish, L.J., (page 356):—

40                   “I am not only not convinced that the testator has used the  
“words ‘nephews and nieces’ so as to include his great-nephews and  
“great-nieces, but I am convinced of the contrary; and having come  
“to that conclusion, and looking at the circumstances under which  
“he has made his will, and at the whole scope and object of the  
“will, I apprehend it would be clearly wrong, by reason of the mere  
“use of the word ‘other’ (which certainly seems to me, to some extent  
“improperly and ungrammatically used), to hold that ‘nephews and  
“‘nieces’ include the great-nephews and great-nieces.”

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*In re Andrews*, 213 App. Div. 479; Appellate Division of the Supreme Court, 1925.

Held: A devise to nephews and nieces of the testatrix is construed not to include a grandniece.

Clause construed: 10

“With the exception of my nephew George U. Gates, I give and bequeath all the rest residue and remainder of all my property and estate to such of my nephews and nieces as survive me, to be divided equally between them share and share alike.”

There were a nephew and niece, children of one sister, and a grandniece, the granddaughter of a pre-deceased sister.

Van Kirk, J. (page 480): 20

“There is nothing whatever in the scheme of the will, or in the use of any kindred words in the will, indicating that ‘nephews and nieces’ have other than their ordinary meaning.”

It should also be pointed out that the words “nieces and nephews” have a definite and precise meaning in our Code, and under the established principles that meaning must be given to them:

*Towns vs. Wentworth*, 11 Moore, P.C. Reports, 542, Pemberton Leigh, page 543: 30

“In order to determine the meaning of a will, the Court must read the language of the testator in the sense which it appears he himself attached to the expressions which he has used. With this qualification, that when a rule of law has affixed a certain dominating meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded, beyond a doubt, such construction.” 40

Article 618 of the Civil Code reads as follows:—

“618. In the collateral line the degrees are reckoned by the generations from one relation up to and not including the common ancestor, and from the latter to the other relation.

“Thus two brothers are in the second degree, uncle and nephew in the third, cousins-german in the fourth, and so on.”

A grandnephew would of course be in a later generation and a different degree of relationship from the nephew referred to in this article, and it is clear that the words "nephews and nieces" in the Code apply only to the first degree of nephews and nieces and not to grandnephews and grandnieces or any subsequent generation of nephews and nieces. The same thing is evident from the provisions of articles 631, 632 and 633 of the  
10 Civil Code, which read as follows:—

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"631. If the father and mother of a person dying without leaving a consort capable of inheriting or issue surviving, or one of them, have survived him, his brothers and sisters as well as his nephews and nieces in the first degree, are entitled to one half of the succession."

20 "632. If both father and mother have previously died, the brothers, sisters, and nephews and nieces in the first degree, of the deceased succeed to him, to the exclusion of the ascendants, and the other collaterals. They succeed either in their own right, or by representatives as provided in the second section of this chapter."

30 "633. The division of the half or of the whole of the succession coming to the brothers, sisters, nephews or nieces, according to the terms of the two preceding articles, is effected in equal portions among them, if they be all born of the same marriage; if they be the issue of different marriages, an equal division is made between the two lines paternal and maternal of the deceased, those of the whole blood sharing in each line, and those of the half blood sharing each in his own line only. If there be brothers and sisters, nephews and nieces on one side only, they inherit the whole of the succession to the exclusion of all the relations of the other line.

40 **THIRD:** *The use by the testatrix of the words "immediate heirs" in brackets following the words "Charles Meredith's "nieces and nephews" was intended by her as descriptive of those "nieces and nephews" as being amongst Charles Meredith's immediate heirs.*

The appellants endeavoured to persuade the court below to alter the will by removing the brackets that enclose the words "immediate heirs" at the end of the provision in question, and by adding additional words before and after those words, and the appellants' contention in that connection will be dealt with in the next following paragraph of this argument, but the respondents submit that in any event the meaning and intention of the words "(immediate heirs)" are entirely clear and without ambiguity. The testatrix used those words twice in the residuary provision of her will with the following intention and effect:

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(a) When dealing with the half of the residue that was to go to the Angus family, she used no brackets, and she provided that that half would go to "my brothers and sisters or their immediate heirs including "my sister Edith's family". Her desire and intention there is clear, namely: that any of her brothers and sisters who might predecease her would be represented by their immediate heirs, if any, including the family of her sister Edith (who has already died when the will was made). If the testatrix had desired or intended that there would be representation in respect of the other half of her residuary estate, it would have been perfectly simple for her to have stated, without the use of any brackets, that she bequeathed that other half to "my husband's Charles Meredith's nieces and nephews or their immediate heirs, including the family of his nephew J. R. Meredith and the family of his niece Maud Ramsay". 10

(b) When the testatrix used the words "immediate heirs" the second time, she made an entirely different use of them, which of itself shows that she had a different intention in mind. In connection with this second use of the words "immediate heirs" she bequeathed the second half of her residuary estate to "my husband's Charles Meredith's nieces and nephews (immediate heirs)", and the respondents submit that this second use of the words "immediate heirs" was purely descriptive and cannot at all be read so as to have the alternative effect that flows from the very different use of those words in the first case. 20

It is important to note that the testatrix made use of brackets at three other places in her will also. Brackets are used by the testatrix (Joint Record page 11, line 36) where she states "to my god child Adelaide Cooley (daughter of Dr. E. M. Eberts) I leave five thousand dollars. The words "daughter of Dr. E. M. Eberts" are here put in brackets with the clear intention to describe and identify Adelaide Cooley, just as the words "immediate heirs" were put in brackets after the words "Charles Meredith's nieces and nephews" in order to describe and identify those nieces and nephews as being amongst Charles Meredith's immediate heirs. There are brackets also in the provision (Joint Record page 11, line 13) "To my niece Peggie daughter of my brother D. J. Angus (Victoria, B.C.) I leave my pearl necklace", and here again the brackets are used to locate and identify D. J. Angus as being resident in Victoria, B.C. The other use of brackets is in the provision (Joint Record page 11, line 5) where it reads 'all funeral, hospital if any) and succession taxes'. This use of brackets constitutes a qualification of the word "hospital", just as the words "immediate heirs" when placed in brackets after the words "Charles Meredith's nieces and nephews" constitute a qualification of the nieces and nephews, which excludes everybody more remotely related to him. It is submitted that all four uses of the brackets in this will clearly preclude the attempted interpretation of those words which the appellants contend for. 30 40

FOURTH: *The courts cannot add to the will the words which the appellants contend should be added, so as to make the provision in question read:*

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10                   “and between my husband's Charles Meredith's nieces and  
“nephews or their immediate heirs, including the family of his ne-  
“pew J. R. Meredith and the family of his niece Maud Ramsay.”

The appellants in the court below contended that the expression:

“Charles Meredith's nieces and nephews (immediate heirs)” must be read by the court as meaning:—

20                   “Charles Meredith's nieces and nephews *or their immediate*  
“heirs *including the family of his nephew J. R. Meredith and the*  
“family of his niece Maud Ramsay”

We have italicized for clearness the words which the appellants must get the courts to add to the will, in addition to removing the brackets, if they are to succeed in their contentions.

*Caron vs. Kirouac*, 37 K.B., 257 (1924) Lafontaine, C.J., page 258:

30                   “S'agit-il, comme la défenderesse-appelante le prétend d'une  
“insuffisance seulement de description de la chose donnée, à la-  
“quelle il faudrait suppléer par interprétation des volontés du tes-  
“tateur par l'addition des deux lots 186-1 et 187, ou s'agit-il dans  
“cette clause, comme le prétendent les intimés, d'une libéralité com-  
“plète par elle-même, à laquelle il n'y a rien à reprendre et surtout  
“à ajouter, et qui doit recevoir son effet suivant les termes et la  
“manière dont elle a été faite, c'est-à-dire limitée à la propriété no  
“185-A ? Telle est la question à résoudre.

40                   “Les termes employés par le testateur appartiennent au lan-  
“guage ordinaire, ils sont clairs et précis et ne présente rien  
“d'obscur ni d'équivoque. Il s'en suit qu'il ne peut être question  
“d'interprétation dans l'espèce, suivant la règle bien connue, qui  
“veut qu'il n'y ait lieu à interprétation que dans les cas d'obscurité  
“ou d'équivoque, et dont l'application ferme la porte à toute dis-  
“cussion.”

(page 261) :

“Comme le dit le savant juge de première instance, les tribu-  
“naux ont le pouvoir d'interpréter, mais non d'ajouter.”

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As already pointed out above, there is no ambiguity or incompleteness in the provision in question in the will, but it should be added that if there were any sufficient ambiguity or incompleteness to justify the court considering the surrounding circumstances in order to interpret the intention of the testatrix, the appellants still would fail.

*J. C. Smith vs. Trustees of the Home of the Friendless*, 1932, S.C.R., 10 713; Lamont, J., page 716:

“In construing a will the duty of the court is to ascertain  
“the intention of the testator, which intention is to be collected  
“from the whole will taken together. Every word is to be given its  
“natural and ordinary meaning and, if technical words are used,  
“they are to be construed in their technical sense, unless from a con-  
“sideration of the whole will it is evident that the testator intended  
“otherwise.”

20

(page 719)

“Is construing the language of the testator where it is am-  
“biguous, we are entitled to consider not only the provisions of the  
“will, but also the circumstances surrounding and known to the tes-  
“tator at the time when he made the will, and adopt the meaning  
“most intelligible and reasonable as being his intention.”

The important circumstances from this point of view are found in  
the provisions of the previous will that had been made by the testatrix, as 30  
admitted by the parties (Joint Record page 6, line 8) and which was a  
notarial will executed before E.W.H. Philips and Colleague, notaries, on  
the 24th February, 1930, (Exhibit No. 2, Joint Record page 13). The re-  
sidual provision in that previous will reads as follows (Joint Record page  
16, line 6):

“AND as to all the rest, residue and remainder of my Estate  
“and property, real and personal, movable and immovable and  
“wheresoever the same may be situate, including all property which 40  
“I may have power to affect by Will I give and bequeath for One  
“half (1/2) to my said husband's brothers and sister or to such of  
“them as may be living at the time of my death, and for the other  
“half (1/2) to my brothers and sisters or to their issue *par souche*  
“by representation in the case of each of them who may predecease  
“me leaving issue, but if any of them should predecease me without  
“leaving issue accretion shall take place in favour of the others  
“with representation *par souche* in favour of the issue of any then  
“dead).”

This residuary provision in the previous will of the testatrix provides for precisely the same division of the residuary estate into two halves: one for representatives of the Angus family, and the other for representatives of the Meredith family, although there is some difference as to who the Meredith representatives were to be. The important thing to note, however, is that the Angus half was bequeathed “to my brothers and sisters  
10 “or to their issue *par souche by representation*”, while the Meredith half was bequeathed “to my said husband’s brothers and sister or to such of “them as may be living at the time of my death”. It is admitted by the parties (Joint Record page 5, line 16) that no brother or sister of the late Charles Meredith survived his widow (the testatrix) except Thomas Graves Meredith, and it was natural that when she made her new holograph will she should change the Meredith bequest from a bequest to Charles Meredith’s brothers and sister, into a bequest to Charles Meredith’s nieces and nephews, the testatrix possibly expecting that she would, in the ordinary course of nature, survive Mr. T. G. Meredith, who would  
20 then be replaced by his sons. An important difference is found in both the wills between the bequest to the Angus representatives “with representation” and the bequest to the Meredith representatives without representation. It should be added, however, that the respondents submit that there is no necessity to consult the other previous will, or any other surrounding circumstances, as the provision in question is complete and unambiguous.

The question of law that the parties have submitted to the court is whether the respondents are the only residuary legatees to whom the testatrix bequeathed the “Meredith” half of her residuary estate, or whether  
30 the appellants are “also entitled to share as residuary legatees *par souches* “as being the immediate heirs of their parents, the nieces and nephews of “the late Charles Meredith who predeceased” his widow, the testatrix.

The appellants’ whole case, therefore is based upon the contention that (by adding to the will the words above referred to) representation is created in favour of the grandnieces and grandnephews who were the children of nieces or nephews of Charles Meredith who had predeceased  
40 the testatrix, his widow. It is important to bear in mind in that connection that our law excludes representation in the collateral line, unless expressly provided for by the will:

*Mignault, Le Droit Civil Canadien*, volume 3, page 307:

“L’ordre des successions a été réglé d’après l’ordre naturel  
“des affections: dans chaque ordre et dans chaque ligne, le parent  
“le plus proche est appelé à succéder, parce que la loi présume que  
“le défunt avait pour lui une affection plus vive que celle qu’il

“accordait à ses parents plus éloignés. Le droit de représentation est fondé sur la même idée: la loi l'accorde à certains parents qui sont présumés avoir succédé, dans le coeur du défunt, à toute la tendresse qu'il avait pour un autre parent prédécédé.

“Il y a lieu, sous ce rapport, à distinguer la ligne directe descendante, la ligne directe ascendante et la ligne collatérale. Dans le premier cas la représentation a lieu à l'infini, dans le second cas elle n'est pas admise du tout, dans le troisième, elle est limitée au cas où des neveux ou nièces concourent avec leurs oncles ou tantes. 10

(page 308)

“Notre article 622, qui n'est que l'expression de l'ancien droit tel que réglé par la coutume de Paris, se lit comme il suit:—

“622. ‘En ligne collatérale la représentation est admise dans le cas seulement où des neveux et nièces viennent à la succession de leur oncle ou tante concurremment avec les frères et soeurs du défunt.’ 20

“Donc, les neveux et nièces seuls bénéficient de la représentation. Les descendants de ces neveux et nièces, les petits-neveux ou petites-nièces, ne peuvent représenter leur grand-père ou grand'mère à la succession de leur grand'oncle ou grand'tante. (Conformément à ce principe, la cour de révision a décidé, dans la cause de *Forbes v. Burns*, que la représentation en ligne collatérale ne s'étend pas aux petits-neveux, 21 R.L., p. 203). Dans notre droit l'affection de l'oncle ou tante n'est pas censé s'étendre plus loin que les neveux et nièces; si le de cuius veut que ses petits-neveux ou ses petites-nièces viennent à sa succession, il n'a qu'à faire un testament qui leur reconnaisse ce bénéfice.” 30

Article 937 of the Civil Code is important in the same sense:

“937. In substitutions, as in other legacies, representation does not take place, unless the testator has ordained that the property shall pass in the order of legitimate successions, or his intention to that effect is otherwise manifest.” 40

This article creates a presumption against any provision in the will providing for representation. The testator must clearly so ordain if he wishes representation to take effect.

There is another consideration which serves to show clearly that the testatrix did not desire or intend the bequest of half her residue to



constitute the provision which would result if the appellant's contentions were maintained. The appellants ask that the provision in question read:—  
"Charles Meredith's nieces and nephews or their immediate heirs" etc., and if that provision were made to read in that way, the result would be not only that the appellants would represent their predeceased father and mother, respectively, but that there would also be included in the resi-  
10 duary legatees everybody who was an "immediate heir" of a niece or nephew of Charles Meredith who predeceased his widow, the testatrix. Any such nieces or nephews who left no children who survived the testatrix would not be "represented" in the legal sense, but there would be "imme-  
"diate heirs", whether surviving consorts or parents or whoever the nearest of kin might be.

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The "joint factum or case" does not disclose whether Mrs. John Redmond Meredith, mother of one of the appellants, and/or Mr. William Ramsay, the father of the other appellants, survived the testatrix, but if  
20 either of them did so survive her, then under the appellant's amendment to the will, Mrs. John Redmond Meredith and/or Mr. William Ramsay would also be "immediate heirs" of John Redmond Meredith himself, and Mrs. William Ramsay herself, respectively, as well as the present appellants, and would have to be added to the persons entitled (according to the appellants) to share in the Meredith half of the residuary estate, as would also have to be added the "immediate heirs" of any others of Charles Meredith's nieces and nephews who had predeceased the testatrix without issue, which would be absurd.

30 A further contention was raised by the appellants in the court below where they argued that the testatrix "went on a basis "of justice and "equity in making this disposition" and that, therefore, the appellants (as Charles Meredith's grandnieces and grandnephews) should be included (by roots) along with his nieces and nephews.

There are two answers to this contention:

40 In the first place, if the court were to decide upon a basis of "justice and equity", then Charles Meredith's brother, Thomas Graves Meredith, should have been the principal, or perhaps the sole, residuary legatee for the Meredith half of the estate, while as a matter of fact he was out of it entirely.

The second answer to this contention is that the testatrix had perfect freedom and discretionary power as to what persons she decided to benefit, as is clear from the provisions of article 831 of the Civil Code, which reads as follows:—

In the  
Court of  
King's Bench  
No. 5  
Respondent's  
Factum  
15 May 1937  
(Continued)

“831. Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction, as to its origin or nature, either in favor of his consort, or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation; saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals.” 10

In any event the provision the testatrix has made in favour of her husband's nephews and nieces does not violate the principle of justice and equity invoked by appellants. She has merely applied the ordinary rule of law excluding representation among collaterals. Obviously she was entitled to select the subjects of her benefaction.

There is in any event no obligation or duty of any kind imposed upon the testatrix to make the provisions of her will either just or equitable, or of any other particular character, provided the provisions are not contrary to public order or good morals, and the respondents respectfully submit that the Meredith half of the residuary estate was clearly bequeathed to Charles Meredith's nieces and nephews, and no part of it was bequeathed to any grandnieces or grandnephews of his, and that the judgment appealed from is well-founded and should be confirmed with costs in appeal against the appellants. 20

Montreal, 15th May, 1937.

30

Meredith, Holden, Heward & Holden,  
Attorneys for Respondents.

G. A. Campbell, K.C.,  
Counsel.

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No. 6

Formal Judgment of the Court of King's Bench (Appeal Side) dismissing the appeal

10 CANADA  
Province of Quebec  
No. 1356

COURT OF KING'S BENCH  
(Appeal Side)

In the  
Court of  
King's Bench  
—  
No. 6  
Formal  
Judgment of  
the Court of  
King's Bench  
(Appeal Side)  
dismissing  
the Appeal  
28 Oct. 1937

Montreal, Thursday the twenty-eighth day of October, one thousand nine hundred and thirty-seven (1937).

Present:

20 Sir Mathias Tellier, Chief Justice of the Province of Quebec,  
The Honourable Mr. Justice DORION,  
" " " " LETOURNEAU  
" " " " BOND,  
" " " " WALSH.

THE COURT having heard the parties by their respective Counsel upon the merits of the present appeal, examined the record and proceedings in the Court below, and deliberated:

30 CONSIDERING that there is no error in the judgment appealed from, to wit: the judgment rendered by the Superior Court sitting at Montreal, in the district of Montreal on the third day of April, one thousand nine hundred and thirty-seven (1937).

DOTH AFFIRM the same with costs to the Respondent against the Appellant.

(Signed) W. L. Bond  
J.K.B.

40

No. 7

Notes of the Hon. Chief Justice Sir Mathias Tellier

Les demandeurs, des petits neveux et petites nièces de feu Charles Meredith, prétendent qu'ils ont le droit de concourir avec les défendeurs, des neveux et nièces du dit Charles Meredith, dans le legs résiduaire que la veuve de ce dernier, Dame Elspeth Hudson Angus, a fait en ces termes—

In the  
Court of  
King's Bench  
—  
No. 7  
Notes of the  
Hon. Chief  
Justice  
Sir Mathias  
Tellier

“The rest of my estate to be divided equally between my  
“brothers and sisters or their immediate heirs, including my sister  
“Edith's family, and between my husband's Charles Meredith's  
“nieces and nephews (immediate heirs.)”

Les défendeurs contestent et nient cette prétention des demandeurs.

10

La question débattue, soumise à la Cour supérieure en un factum ou mémoire conjoint dressé suivant que pourvu à l'article 509 C.P.C. a été résolue contre les demandeurs et en faveur des défendeurs par l'honorable juge en chef Greenshields, dans un jugement fort élaboré.

Les demandeurs appellent de ce jugement.

Je suis d'opinion, après étude de la cause, que leur prétention ne peut nullement être entretenue.

20

L'expression “neveux et nièces” ne comprend pas “petits neveux et “nièces”, ni en droit, ni dans le langage courant.

“Neveu”, “nièce”, en droit et dans le langage courant, cela signifie le fils, la fille du frère ou de la soeur (Rolland de Villargue, Répertoire du Notariat: — Ferrière, Dictionnaire de Droit:— American and English Encyclopedia of Law Vo. “Nephew, Niece”:— Funk and Wagnalls, Comprehensive Standard Dictionary: — Larousse, Dictionnaire et Encyclopédie: — Littré).

30

Rien dans la disposition ci-dessus du testament n'indique de la part de la testatrice l'intention de donner aux mots “nieces and nephews” un sens autre que le sens ordinaire de ces mots.

L'addition entre crochets des mots “(immediate heirs)” ne change rien au sens ordinaire des mots “nieces and nephews”. Loin de là, elle précise davantage ce sens, à mon avis: elle indique clairement que dans la pensée de la testatrice, les neveux et nièces qu'elle appelle sont ceux qui auraient recueilli, si son défunt mari était mort sans testament.

40

Inutile de dire que si le mari de la testatrice n'avait pas laissé de testament, les défendeurs auraient hérité de lui, mais non les demandeurs, la représentation n'étant pas admise en un tel cas.

Par ces motifs, comme par ceux exposés par M. le juge Bond dans ses notes, je confirmerais le jugement de la Cour supérieure et rejetterais l'appel, avec dépens.

(signé) Mathias Tellier,  
J.C.P.Q.

Notes of Mr. Justice Bond

In the  
Court of  
King's Bench  
—  
No. 8  
Notes  
of Mr. Justice  
Bond

10 The plaintiffs in the Superior Court appeal from a judgment rendered on the 3rd April, 1937 (Greenshields C.J.,) dismissing their action.

The matter came before the Superior Court under the provisions of article 509 C.C.P. upon an agreed statement as to the facts, calling for a decision upon a question of law arising therefrom.

The statement of facts agreed upon is as follows:

20 (1) The late Dame Elspeth Hudson Angus, in her lifetime of the City of Montreal in the Province of Quebec, widow of the late Charles Meredith in his lifetime of the same place, died on the 24th June, 1936, in the said City where she was domiciled.

(2) At the time of her death, the estate of the late Dame Elspeth Hudson Angus (Mrs. Meredith) was of the gross value of about \$2,500,000.00, and was derived approximately as to one-half from the estate of her late father R. B. Angus and one-half from the estate of her late husband Charles Meredith.

30 (3) She left as her last will and testament a holograph will, a photostat copy whereof is herewith produced and filed as exhibit No. 1 to form part hereof.

(4) This will was duly probated by judgment of the Prothonotary of the Superior Court for the District of Montreal, dated the 29th July, 1936.

40 (5) The fourth paragraph of the said Will ended with the words:

“The rest of my estate to be divided equally between  
“my brothers and sisters or their immediate heirs including  
“my sister Edith's family and between my husband's Charles  
“Meredith's nieces and nephews (immediate heirs)”.

(6) The “brothers and sisters” of the late Mrs. Elspeth H. Meredith who survived her were: D. Forbes Angus, William F. Angus, D. James Angus, Dame Maud Angus, wife of Dr. W. W.

Chipman, Dame Bertha Angus, widow of R. McD. Paterson, and Dame Margaret Angus, wife of Dr. C. F. Martin; and the said "my sister Edith" was the late Mrs. F. L. Wanklyn, who predeceased her sister, the late Mrs. Elspeth Meredith, and "my sister Edith's family" who were expressly included are: David A. Wanklyn and Frederick Wanklyn the second, and Dame Gyneth Wanklyn, wife of Durie McLennan.

10

(7) The residuary estate of the said late Dame Elspeth H. Meredith was thereby divided into two equal halves, one of which halves was to be divided "between my husband's Charles Meredith's nieces and nephews (immediate heirs)".

(8) The defendants Mrs. Thorburn, Mrs. Peters, Miss Mary Meredith, John Stanley Meredith and Thomas Redmond Meredith, with the late Edmund Meredith, Junior, were the only nieces and nephews of the said Charles Meredith who survived the said Dame Elspeth H. Meredith. 20

(9) There was no brother or sister of the said late Charles Meredith who survived his said widow the late Dame Elspeth Hudson Meredith, except his brother Thomas Graves Meredith who is still living and who is the father of the two defendants John Stanley Meredith and Thomas Redmond Meredith.

(10) The late John Redmond Meredith who was the father of the plaintiff Diana Meredith (Mrs. Provost) and who was the nephew of the late Charles Meredith died on the 25th day of November, 1916, and the late Maud Meredith (Mrs. William Ramsay) who was the mother of the other five plaintiffs and a niece of the late Charles Meredith died in October 1928. 30

(11) The said late Edmund Meredith, junior, died on the 5th August, 1936, and is now represented by The Royal Trust Company, administrator of his estate.

(12) The plaintiffs are grand-nieces and grand-nephews of the said late Charles Meredith, and are sons and daughters of nieces and nephews of the said late Charles Meredith, who had predeceased the said Dame Elspeth H. Meredith, and the said plaintiffs are the only such grand-nieces and grand-nephews who survived the said Dame Elspeth H. Meredith. 40

(13) The said Dame Elspeth H. Meredith had previously made a Last Will and Testament in authentic form before E. W. H. Phillips and Colleague, notaries, dated 24th February, 1930, of

which a copy is herewith produced as exhibit No. 2, which was revoked by the terms of her holograph last will aforesaid.”

The question of law upon which the parties hereto are at variance is as follows:

In the  
Court of  
King's Bench  
—  
No. 8  
Notes  
of Mr. Justice  
Bond  
(Continued)

### QUESTION OF LAW

10 Are the defendants the only residuary legatees to whom the said Dame Elspeth H. Meredith bequeathed the said half of her residuary estate, or are the plaintiffs also entitled to share as residuary legatees *par souches* as being the immediate heirs of their parents, the nieces and nephews of the said late Charles Meredith who predeceased the said late Dame Elspeth H. Meredith as aforesaid?

20 The cardinal rule relating to wills is that effect should be given to the intentions of the testator, and those intentions are to be ascertained from the will itself, taking the words or terms used in their ordinary and natural sense.

30 A number of other rules of law relating to the interpretation of wills have been invoked in the present case, — but these rules, it must be remembered, are applicable for the most part only in the case where ambiguity arises from the words used, or the terms employed by the testator. These rules, based upon common sense and experience, are found embodied in cases, text books and doctrine, and are valuable guides where necessity arises requiring their assistance, — but they are only to be resorted to when there is ambiguity or doubt as to the intentions of the testator so far as they could be gathered from the will itself.

The Civil Code, article 872, provides as follows:

40 The rules concerning legacies and the presumptions of the testator's intention, as well as the meaning ascribed to certain terms, give way to the formal or otherwise sufficient expression of such intention, given in another sense or with a view to different effects. The testator may derogate from these rules in all that is not contrary to public order, to good morals, to any law containing a prohibition or some other applicable declaration of nullity, or to the rights of creditors and third persons.

*In re Browne*, 1934 S.C.R. 324, at page 330, Rinfret J, said, —

It is unnecessary to repeat that the golden rule, the fundamental principle whereby the courts must be guided in the interpretation of testamentary documents, is that effect must be given to the testator's intention ascertainable from the expressed language of the instrument. So far as possible, the will itself must speak...

Each will must be construed according to the apparent intention of the testator (Williams on Executors, 12th ed. p. 726). While the well known rules or the decided cases are no doubt helpful in ambiguous matters or in affording illustrations, “in every case it is “the testator’s intention, if it can be gathered from the will, which “must govern.”

With us, the utmost freedom is allowed in the matter of testamentary dispositions, subject only to a few exceptions which in the present case do not arise. (C.C. 831). As a result, the Court is not concerned with the justness or equitableness of the disposition, — that is solely a matter within the discretion of the testator, whose ideas must prevail if capable of being ascertained.

In the will now under consideration, the testatrix, who left no issue, discloses a plan (and it is common ground that that is so) whereby she proposed to dispose of her residuary estate by dividing it. One-half was to go to members of her own family (Angus), and the remaining half to her husband’s family (Meredith). In the prosecution of this design, she was perfectly free to select the member or members of the respective families who should be the beneficiaries in their respective class, and she was perfectly at liberty to vary the degree of relationship in one class from that which she had determined in regard to the other class.

In the case of her own family she named as beneficiaries her brothers and sisters or their immediate heirs, and she took pains to mention the name of a predeceased sister whose family should be included in the bequest. No question arises in respect to this share of her estate.

In the case of her husband’s family she exercised her undoubted right to choose who should be her heirs, and she selected his nieces and nephews, adding in brackets “immediate heirs”. What was in her mind and what was her intention when she used these words, is the question that falls to be decided.

It is pointed out that if the words “immediate heirs” are designed to describe the nieces and nephews as in the case of intestacy, the description is not correct, for Mr. T. G. Meredith, a brother of the husband of the testatrix, would be in such case an immediate heir, and from this point of view his two sons, although nephews, were not immediate heirs.

It is further contended that the use of the words in brackets implies the idea of a representative class, which would involve the introduction of the doctrine of “representation”.

In the  
Court of  
King’s Bench  
—  
No. 8  
Notes  
of Mr. Justice  
Bond  
(Continued)

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Representation is defined by the Civil Code as follows:

In the  
Court of  
King's Bench  
No. 8  
Notes  
of Mr. Justice  
Bond  
(Continued)

619. Representation is a fiction of law, the effect of which is to put the representatives in the place, in the degree and in the rights of the person represented.

Reference should also be made to the first part of article 620:

10

620. Representation takes place without limit in the direct line descending.

also to article 622:

622. In the collateral line representation is admitted only where nephews and nieces succeed to their uncle and aunt concurrently with the brother and sister of the deceased.

20 and article 937:

937. In substitutions, as in other legacies, representation does not take place, unless the testator has ordained that the property shall pass in the order of legitimate successions, or his intention to that effect is otherwise manifest.

30 In the present case I should say that representation, under the provisions of the last-quoted articles, does not take place, for the testatrix has not followed the order of legitimate successions in an intestate estate but has passed over one of the persons who, in the case of intestacy, would have inherited, e.g. Mr. T. G. Meredith.

Again, this is not the case specified in article 622 above cited, but is the claim of grand-nephews and grand-nieces to succeed to their uncle concurrently with nephews and nieces. The words of the Code do not support this contention. (See also 3 Mignault, p. 309):

40 “ ‘622. En ligne collatérale la représentation est admise dans le cas seulement où des neveux et nièces viennent à la succession de leur oncle ou tante concurremment avec les frères et soeurs du défunt.’

Donc, les neveux et nièces seuls bénéficient de la représentation. Les descendants de ces neveux et nièces, les petits-neveux ou petites-nièces, ne peuvent représenter leur grand-père ou grand-mère à la succession de leur grand-oncle ou grand-tante. Dans notre droit l'affection de l'oncle ou tante n'est pas censée s'étendre plus loin que les neveux et nièces; si le *de cuius* veut que ces petits-neveux ou ces petites-nièces viennent à la succession, il n'a qu'à faire un testament qui leur reconnaisse ce bénéfice.”)

In the  
Court of  
King's Bench  
No. 8  
Notes  
of Mr. Justice  
Bond  
(Continued)

But some effect, if possible, must be given to these words of the testatrix, for it cannot be assumed that they were meaningless. It is true that the appellants claim that she was "*inops consilii*" or "wanting advice". But I should say, from a consideration of the whole of the will, that she displayed considerable aptitude. Possibly this may be attributed, in part, to the fact that some five years previously she had the assistance of a very respectable member of the notarial profession in preparing and executing a will in authentic form, which will she, however, by the express terms of the holograph will, entirely revoked. — Apart from this statement I do not take that earlier will into consideration in any way, as I do not think that I am entitled to do so. — 10

In considering the effect to be given to the words "(immediate heirs)", it is asserted on behalf of the appellants that they should be given the same meaning in the case of the "Meredith" clause as they bear in the "Angus" clause. 20

But to my mind the wording and context of the clauses is quite different. In the "Angus" clause the testatrix says "my brothers and sisters or their immediate heirs", while in the "Meredith" clause she says "my husband's nieces and nephews (immediate heirs)". To begin with, the absence of the words "or their" in the latter clause is very significant, and it does not appear to me a clumsy way of reimporting into the second clause, by a short cut, what she meant by the words in the first clause. Rather does it appear to me that the words "immediate heirs" in the two clauses are used in opposition to one another, and require to be distinguished. In the case of her own family the immediate heirs of a predeceased brother or sister were included in the bequest: in the case of her husband's family the testatrix went directly to the nephews and nieces, passing over a brother, and describing the nephews and nieces as the immediate heirs, and as a consequence, I should say, excluding all who were not nephews and nieces. 30

Considerable colour is lent to this view by the fact that when the testatrix made the will in question in 1935 and expressly provided for the case of the family of her predeceased sister Edith, or any other brother or sister who might predecease her, she must be taken to have been aware of the death, long before, (1916) of Mr. J. R. Meredith, one of her husband's nephews and the father of one of the appellants, and she must also be taken to have been aware of the death of Mrs. William Ramsay, a niece of her husband who died in 1928 and was the mother of the remaining appellants. Notwithstanding this, the testatrix avoided the use of words that she had already used in the earlier part of the clause, and which would have included the appellants. 40

It may be, as claimed by the appellants, that such a construction imposes upon the will an unreasonable and capricious intention in making the quality of heirship depend upon an accident of fate in surviving. But I am not prepared to say that such an intention would be so capricious. The testatrix may well have intended to restrict this legacy to nephews and nieces and to exclude the possibility of it extending to strangers, as, for example, a consort of a deceased nephew or niece.

In the  
Court of  
King's Bench  
—  
No. 8  
Notes  
of Mr. Justice  
Bond  
(Continued)

As pointed out by the learned trial Judge, the words "nephews and nieces" do not include grand-nephews and grand-nieces. (Cf *Blower's Trusts* L.R., 6 Ch. App. Cas. 351; and also C.C. articles 631 and following).

Doubtless, by the use of appropriate words, the testatrix might have included grand-nephews and grand-nieces, but unless the words in brackets can be taken as appropriate words to convey that intention, the legacy is restricted to nephews and nieces.

20 The contention of the respondents on this point is, that the words in question are merely words added by way of description of the nephews and nieces as being amongst Charles Meredith's immediate heirs.

This use of words in brackets to further describe or identify someone occurs in two other instances in this will. (CASE p. 11, line 13; & CASE p. 11, line 36).

30 In my opinion, the testatrix used these words in brackets as descriptive and limitative words, indicating that in this case the named or described persons, or the survivors of them, were to be the heirs and not any more remote persons in their place and stead. In other words, the expression is here used in contradistinction to the provisions she had expressly made in the case of her own family. Such a construction does not involve the addition or "reading into" the will of any additional words.

I consequently reach the same conclusion as that at which the learned trial Judge arrived, and I would AFFIRM that judgment.

40 There remains a question as to the costs incurred on the present appeal.

The appellants submit that even if their appeal be dismissed, the costs should be paid out of the half of the estate passing to the Meredith heirs. In support, they invoke the agreement between the parties that the costs in the Superior Court should, in any event, be so paid (CASE p. 10), and they submit that a similar disposition should be made of the costs on this appeal.

In the  
Court of  
King's Bench  
No. 8  
Notes  
of Mr. Justice  
Bond  
(Continued)

The general rule regarding costs is contained in article 549 C.C.P. which reads, in part, as follows:

549. The losing party must pay all costs, unless for special reasons the court reduces or compensates them, or orders otherwise....

From this it will be seen that a certain discretion is conferred upon the Court permitting it, for special reasons, to vary or depart from the general rule that the losing party must pay. — But this discretion is not an arbitrary discretion; it is a judicial discretion, that is to say, its exercise must be in accordance with some ascertainable principle. 10

In the present case I have been unable to find any special reason or to ascertain any principle calling for the exercise of such discretion. It is true that the parties made an agreement in regard to the costs of submitting the matter for the opinion or judgment of the Superior Court, but that is as far as they went, and I do not consider that the party dissatisfied with the result of that judgment is entitled to carry the matter further at the expenses of the estate, which, in the light of the present decision, means the respondents. 20

The risk of paying costs was incidental to the appeal and must, in the usual course of events, fall upon the party bringing that appeal where unsuccessful. I see no reason why the appellants should risk, conceivably, a series of appeals without assuming also the risk of the costs.

The appellants invoke a judgment of this Court where the costs of an unsuccessful appeal were placed at the charge of the estate (*Gelinas & Paquin et al*, 32 K.B. 431). In that case an interpretation of a will was also involved. 30

But I think the cases can be distinguished. In the *Gelinas* case (*supra*) Martin, J., attached same importance to the fact that the legislature, in passing an act relating to that estate, had placed the costs and fees of that act at the charge of the estate. Rivard, J., expressed himself as follows, at page 439:

“Je confirmerais. Mais vu l'esprit dans lequel toutes les parties se sont présentées devant la Cour supérieure et aussi devant la Cour du banc du roi, je mettrais les dépens, même en cour d'appel, contre la masse des biens de la succession.” 40

Apparently in the *Gelinas* case the parties came before this Court seeking an interpretation rather than, as in the present case, demanding a right, and I can see no good grounds for extending the consent which existed in the Superior Court as to the costs, to a subsequent appeal.

I would AFFIRM the judgment of the Superior Court and DISMISS the appeal with costs.

(Signed) W. L. Bond,  
J.K.B.

In the  
Court of  
King's Bench  
—  
No. 8  
Notes  
of Mr. Justice  
Bond  
(Continued)

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No. 9

Opinion du juge Letourneau

Pour les raisons que donne dans ses notes M. le juge Bond, je rejetterais l'appel et confirmerais l'interprétation qu'a donnée au testament le tribunal de première instance.

(Signé) Severin Letourneau,  
J.C.B.R.

In the  
Court of  
King's Bench  
—  
No. 9  
Opinion  
of Mr. Justice  
Letourneau

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No. 10

Opinion of Mr. Justice Walsh

I concur with Mr. Justice Bond.  
I would dismiss the appeal, with costs.

(signed) J. C. Walsh,  
J.K.B.

In the  
Court of  
King's Bench  
—  
No. 10  
Opinion  
of Mr. Justice  
Walsh

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No. 11

Certificate of Clerk of Appeals in re: Notes of the Hon. Justice Dorion

Je certifie que l'Hon. Juge Dorion n'a pas produit de notes en cette cause.

(Signé) Pouliot & Laporte

In the  
Court of  
King's Bench  
—  
No. 11  
Certificate  
of Clerk  
of Appeals  
in Re:  
Notes of the  
Justice  
Dorion

40

No. 12

Motion to Allow an Appeal  
Affidavit & Notice

TO ANY OF THE HONOURABLE JUDGES OF THE COURT 10  
OF KING'S BENCH SITTING IN APPEAL IN AND FOR THE  
DISTRICT OF MONTREAL.

MOTION ON BEHALF OF APPELLANTS TO ALLOW AN  
APPEAL TO HIS MAJESTY IN HIS PRIVY COUNCIL AND TO  
FIX DELAY TO FURNISH SECURITY:

Whereas this Honourable Court, by judgment rendered on the 28th  
day of October, 1937, dismissed, with costs, the appeal of the Appellants  
from the judgment, *a quo*, which dismissed Appellants' action for a de- 20  
claration that they are among the universal residuary legatees of the estate  
of the late Mrs. Charles Meredith;

Whereas the share claimed by each of the Appellant herein in the  
estate of the late Mrs. Charles Meredith is in an amount in excess of  
Twelve thousand dollars (\$12,000.00);

Whereas the present case concerns matters in which the rights in  
future of the parties may be affected;

Whereas the Appellants believe themselves to be aggrieved by the  
said judgment and are desirous of appealing therefrom to His Majesty in  
his Privy Council and hereby respectfully do so appeal;

THAT the Appellants' appeal to His Majesty in his Privy Council  
from the judgment rendered herein by this Honourable Court on the 28th  
day of October 1937 be allowed and that the Appellants be permitted to  
appeal therefrom and that, pending said appeal, the execution of the said  
judgment may be suspended; and that a delay be fixed by this Honourable  
Court within which the Appellants shall furnish good and sufficient secu- 40  
rity as required by law, effectively to prosecute the said appeal and to pay  
such costs as may be awarded by His Majesty in his Privy Council in the  
event of said judgment being confirmed; the whole with costs to follow  
suit.

Montreal, November 9th 1937.

Brown, Montgomery & McMichael,  
Attorneys for Appellants.

In the  
Court of  
King's Bench  
No. 12  
Motion  
to allow  
an Appeal  
Affidavit  
& Notice  
9 Nov. 1937

AFFIDAVIT

In the  
Court of  
King's Bench  
—  
No. 12.  
Motion  
to allow  
an Appeal  
Affidavit  
& Notice  
9 Nov. 1937  
(Continued)

I, ALEXANDER M. RAMSAY, of the City of Toronto, in the Province of Ontario, being duly sworn do depose and say:

- 10           1. That I reside in the said City of Toronto at No. 119 Imperial Street.
2. That I am one of the Appellants in the present case.
3. That I have read the foregoing motion and that the facts therein alleged are to the best of my knowledge and belief true.

AND I HAVE SIGNED

20 SWORN to before me at the City  
of Toronto, in the Pro-  
vince of Ontario this  
8th day of November, 1937.

A. M. Ramsay

(Signed) I. F. Hellmuth  
A Notary Public  
in and for the Province of Ontario

(SEAL)

30

NOTICE

To  
Messrs. Meredith, Holden, Heward & Holden,  
Attorneys for Respondent.  
Sirs:

40           Take notice of the foregoing motion with the affidavit attached and that it will be presented for allowance to one of the Honourable Judges of the Court of King's Bench sitting in appeal in and for the District of Montreal, at the Court House, Montreal, on the 12th day of November, 1937, at eleven o'clock in the forenoon or so soon thereafter as counsel may be heard; and do you govern yourselves accordingly.

Montreal, November 9th 1937.

Brown, Montgomery & McMichael,  
Attorneys for Appellants.

No. 13

Judgment of the Hon. Mr. Justice Letourneau on the above motion

Montreal, Friday, the twelfth day of November, One thousand nine hundred and thirty-seven. 10

PRESENT: Honourable Mr. Justice Letourneau (In Chambers)

Having heard the parties by their respective Counsel on the petition of the plaintiffs-appellants for leave to appeal to His Majesty in his Privy Council from the final judgment pronounced in this case by the Court of King's Bench (Appeal Side), at Montreal, on the 28th day of October, 1937, and to fix a delay within which security on the said appeal should be furnished: 20

CONSIDERING that, by reason of the nature and the circumstances of this case, an appeal lies from the said judgment to His Majesty in his Privy Council in virtue of Article 68 of the Code of Civil Procedure of the Province of Quebec;

I, the undersigned, one of the Judges of this Court of King's Bench, DO FIX a delay expiring on the 15th day of January, 1938, within which the appellants may give, in conformity with the provisions of Article 1249 of the said Code of Civil Procedure, and in the manner and for the purposes therein mentioned, the security required by the law governing the said appeal, costs to follow. 30

(Signed) Severin Letourneau,  
J.C.K.B.

No. 14

Notice of Furnishing of Security

To: Mtres Meredith, Holden, Heward & Holden,  
Attorneys for Respondents,  
Montreal.

Sirs:

Take notice that on the twenty-first day of December, 1937, at eleven o'clock in the forenoon, before a Judge of the Honourable Court of King's Bench, Appeal Side, for the District of Montreal, sitting in Chambers in the Court House, Montreal, Appellants will furnish the security required 40

In the  
Court of  
King's Bench  
No. 13  
Judgment  
of the Hon.  
Mr. Justice  
Letourneau  
on the Motion  
12 Nov. 1937

In the  
Court of  
King's Bench  
No. 14  
Notice of  
Furnishing  
of Security  
20 Dec. 1937



for the costs of the Respondents in this cause in their appeal to His Majesty in his Privy Council, the whole in accordance with the judgment of the Honourable Mr. Justice Letourneau rendered on the twelfth day of November, 1937, the said security to be in the form of a surety bond of The Canadian Surety Company, a body politic and corporate, duly incorporated, having its head office in the City of Toronto, in the Province of Ontario and having its chief place of business for the Province of Quebec in the City of Montreal, in the said Province of Quebec and duly authorized to become surety before the Courts of the Province of Quebec; and do you take notice thereof and of said appeal and govern yourselves accordingly.

In the Court of King's Bench  
—  
No. 14  
Notice of Furnishing of Security  
20 Dec. 1937  
(Continued)

Montreal, 20th December, 1937.

Brown, Montgomery & McMichael,  
Attorneys for Appellants.

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No. 15

In the Court of King's Bench  
—  
No. 15  
Security in Appeal to Privy Council  
21 Dec. 1937

Security in Appeal to Privy Council

Number 171933

DUPLICATE

THE CANADIAN SURETY COMPANY

CANADA :  
Province of Quebec :  
District of Montreal :

30 WHEREAS on the 3rd day of April, one thousand nine hundred and thirty-seven, judgment was rendered by Honourable Chief Justice Greenshields of the Superior Court for the Province of Quebec sitting at Montreal in the District of Montreal in a certain cause between

40 DAME DIANA MEREDITH, wife of Marcel Provost, of Cancor-neau in the Department of Finistere in the Republic of France; DAME MARGARET M. RAMSAY, wife of Charles Chambers in the City of Toronto, in the Province of Ontario, Canada; DAME CONSTANCE M. RAMSAY, wife of Jessup Carley of the said City of Toronto; ALEXANDER M. RAMSAY of the said City of Toronto, stockbroker; WILLIAM M. RAMSAY, of the City of Calgary in the Province of Alberta; and DAME ELIZABETH M. RAMSAY, wife of George Cumpston of the said City of Toronto;

PLAINTIFFS-APPELLANTS.

and

In the  
Court of  
King's Bench

No. 15  
Security  
in Appeal  
to Privy  
Council  
21 Dec. 1937  
(Continued)

DAME ISABEL MAGDALENE MEREDITH, of the said City of Toronto, widow of the late James David Thorburn in his lifetime also of the said City of Toronto; DAME CONSTANCE M. R. MEREDITH of the City of Brussels in the Kingdom of Belgium, widow of the late George Armstrong Peters in his lifetime of the said City of Toronto; MISS MARY MEREDITH, spinster, of the City of London in the Province of Ontario; THE ROYAL TRUST COMPANY, es-qualite, administrator of the Estate of the late EDMUND MEREDITH, JUNIOR, in his lifetime of the City of London, in the Province of Ontario; JOHN STANLEY MEREDITH of the City of London in the Province of Ontario, Gentleman, and THOMAS REDMOND MEREDITH of the City of London, in the Province of Ontario, Gentleman,

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DEFENDANTS-RESPONDENTS

which said Judgment has been confirmed by the Court of King's Bench, sitting in Appeal, on the 28th day of October, One thousand nine Hundred and Thirty-Seven;

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AND WHEREAS the said Judgment has been appealed from to His Majesty in His Privy Council by the said PLAINTIFFS-APPELLANTS, thus rendering necessary the security required by Article 1249 of the Code of Civil Procedure;

THEREFORE, THESE PRESENTS TESTIFY THAT, on the 21st day of December, One Thousand, Nine Hundred and Thirty-seven, came and appeared The Canadian Surety Company, incorporated by Special Act of the Parliament of Canada, having its Head Office in the City of Toronto, in the Province of Ontario, and having its Chief Office for the Province of Quebec in the City of Montreal in the said Province of Quebec, and duly authorized to become Surety before the Courts of the Province of Quebec, by Order-in-Council, dated the Twenty-fourth day of July, One Thousand, Nine Hundred and Thirteen, under the provisions of Articles 7446 and 7452, R.S.Q. 1909, said authorization having been published in the Quebec Official Gazette on the Ninth day of August, One Thousand, Nine Hundred and Thirteen; and herein represented and acting by H. L. GYTON, one of the Resident Attorneys and J. E. BENOIT, one of the Resident Assistant Secretaries, of the said Company, duly authorized by resolution of the Board of Directors of the said The Canadian Surety Company, duly certified copy of said resolution being hereunto annexed, and which said Company has acknowledged and hereby acknowledges itself to be the legal surety of the said Plaintiffs-Appellants, in regard to the said appeal, and hereby promises and binds and obliges itself that, in case the said Plaintiffs-Appellants do not effectually prosecute the said

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appeal, do not satisfy the condemnation and pay such costs and damages as may be awarded by His Majesty, in case the judgment appealed from is confirmed, then the said Surety will satisfy the said condemnation in principal, interest and costs and pay such costs and damages as may be awarded by His Majesty in case the judgment appealed from is confirmed, to the extent of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) in Canadian funds, to the use and profit of the said Respondents, theirs heirs, administrators, executors and assigns.

In the  
Court of  
King's Bench  
No. 15  
Security  
in Appeal  
to Privy  
Council  
21 Dec. 1937  
(Continued)

And the said The Canadian Surety Company has signed these presents by its said Resident Officers.

Taken and acknowledged  
before me at Montreal,  
P.Q. this 21st day  
of December, A.D. 1937.

The Canadian Surety Company,  
By: (Signed) H. L. Gyton,  
Resident Attorney.

20 (Signed) Pouliot & Laporte,  
Greffier des Appels.

(Signed) J. E. Benoit,  
Resident Assistant Secretary.

(SEAL)  
The Canadian Surety Company

THE CANADIAN SURETY COMPANY  
Certificate of election

of resident officers of The Canadian Surety Company

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At the meeting of the Board of Directors of THE CANADIAN SURETY COMPANY held at the Head Office of the Company in the City of Toronto on Thursday, January 28th, 1937, it was

“RESOLVED that the Secretary of the meeting be authorized to cast one ballot on behalf of the Directors present for officers of the Company for the ensuing year and until their successors are elected as follows:

40	Place:	Resident Attorneys:	Resident Assistant Secretaries:
	Montreal, Que.	J. P. Brophy H. L. Gyton R. C. Bewes	J. P. Brophy H. L. Gyton R. C. Bewes J. E. Benoit D. E. T. Philbrick

which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.”



5. The Factum of Respondents before the Court of King's Bench.
6. Formal judgment of the Court of King's Bench dismissing the appeal.
7. The notes of Honourable Chief Justice Sir Mathias Tellier.
8. The notes of Honourable Mr. Justice Bond.
9. The notes of Honourable Mr. Justice Letourneau.
10. The notes of Honourable Mr. Justice Walsh.
11. The notes of Honourable Mr. Justice Dorion.
12. Notice of appeal with motion to allow an appeal to His Majesty in His Privy Council and to fix delay to furnish security.
13. Judgment of the Honourable Mr. Justice Letourneau on the above motion.
14. Notice of furnishing security.
15. Surety bond of The Canadian Surety Company.
16. Consent of the parties as to the contents of the Record transcript to His Majesty in His Privy Council.

In the  
Court of  
King's Bench  
—  
No. 16  
Consent  
of Parties  
as to Contents  
of the  
Transcript  
Record  
for His  
Majesty  
in His Privy  
Council  
31 Dec. 1937  
(Continued)

It is also hereby agreed between the parties hereto, by the undersigned, their Attorneys, that there shall also be transmitted to His Majesty in His Privy Council ten (10) photostatic copies of the Last Will and Testament in holograph form of the late Dame Elspeth Hudson Angus, widow of the late Charles Meredith, probated on 29th July, 1936, by the Superior Court of the Province of Quebec for the District of Montreal, fyled as Exhibit No. 1 with the joint factum or case for decision of question of law upon facts admitted.

Montreal, 31st December, 1937.

Brown, Montgomery & McMichael,  
Attorneys for Appellants.

Meredith, Holden, Heward & Holden,  
Attorneys for Respondents.

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In the  
Court of  
King's Bench

No. 17

No. 17  
Fiat for  
Transcript  
of Record  
7 Feb. 1938

**Fiat for Transcript of Record**

We, the undersigned Attorneys for Appellants herein, do hereby require the preparation of the transcript record in appeal to His Majesty 10 in His Privy Council, the said transcript to consist of and include only:

1. Joint Factum or case for decision of question of law upon facts admitted; and the exhibits referred to therein.
2. The judgment of the Superior Court, the Honourable Chief Justice R. A. E. Greenshields.
3. The inscription in appeal before the Court of King's Bench.
4. The Factum of Appellants before the Court of King's Bench. 20
5. The Factum of Respondents before the Court of King's Bench.
6. Formal judgment of the Court of King's Bench dismissing the appeal.
7. The notes of Honourable Chief Justice Sir Mathias Tellier.
8. The notes of Honourable Mr. Justice Bond.
9. The notes of Honourable Mr. Justice Letourneau.
10. The notes of Honourable Mr. Justice Walsh. 30
11. The notes of Honourable Mr. Justice Dorion.
12. Notice of appeal with motion to allow an appeal to His Majesty in His Privy Council and to fix delay to furnish security.
13. Judgment of the Honourable Mr. Justice Letourneau on the above motion.
14. Notice of furnishing security.
15. Surety bond of The Canadian Surety Company. 40
16. Consent of the parties as to the contents of the Record transcript to His Majesty in His Privy Council.
17. Fiat for transcript of record to His Majesty in His Privy Council.

Montreal, February 7th, 1938.

Brown, Montgomery & McMichael,  
Attorneys for Appellants.

Record approved.

BROWN, MONTGOMERY & McMICHAEL,  
Attorneys for Plaintiffs.

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MEREDITH, HOLDEN, HEWARD & HOLDEN,  
Attorneys for Defendant.

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Certificate of Clerk of Appeals

In the  
Court of  
King's Bench  
Certificate  
of Clerk  
of Appeals

We the undersigned Alphonse Pouliot and Clovis Laporte, K.C.,  
Clerk of Appeals of His Majesty's Court of King's Bench, for the Pro-  
20 vince of Quebec, do hereby certify that the present transcript, from page  
one to page 86 contains

True and faithful copies of all the original papers, documents, pro-  
ceedings and of judgments of His Majesty's Superior Court for the Prov-  
ince of Quebec, sitting in the City of Montreal,

Transmitted to the Appeal Office, in the said City of Montreal, as  
the Record of the said Superior Court in the cause therein lately pending  
and determined between Dame Diana Meredith & al., Plaintiffs and Dame  
30 Elizabeth Magdalene Meredith et al., Defendants,

And also true copies of all the proceedings of the said Court of  
King's Bench (Appeal Side) and the final judgment therein rendered on  
the said Appeal instituted by the said Appellants.

In faith and testimony whereof, we have, to these presents, set and  
subscribed our signature and affixed the seal of the said Court of King's  
Bench, (Appeal Side).

40 Given at the City of Montreal, in that part of the Dominion of  
Canada, called the Province of Quebec, day in  
the year of Our Lord one thousand nine hundred and thirty-eight.

L.S

POULIOT & LAPORTE,  
Clerk of Appeals.

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Certificate of Chief Justice

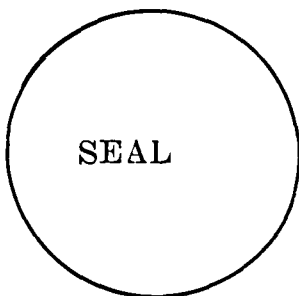
I, the undersigned Honorable Sir Mathias Tellier, Chief Justice of the Province of Quebec, do hereby certify that the said Alphonse Pouliot and Clovis Laporte, K.C., are Clerk of the Court of King's Bench, on the Appeal Side thereof, and that the initials "P and L" subscribed at every eight pages and the signature "Pouliot & Laporte" of the certificate above written, is their proper signature and hand writing. 10

I do further certify that the said Pouliot & Laporte as such Clerk, are the Keeper of the Record of the said Court, and the proper Officer to certify the proceedings of the same, and that the seal above set is the seal of the said Court, and was so affixed under the sanction of the court.

In testimony whereof, I have hereunto set my hand and seal, at the City of Montreal, in the Province of Quebec, this            day of            in the year of Our Lord one thousand nine hundred and thirty eight and of His Majesty's Reign, the first. 20

L.S.

SIR MATHIAS TELLIER,  
Chief Justice of the Province of Quebec.



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In the  
Court of  
King's Bench

Certificate  
of Chief  
Justice