

ON APPEAL
FROM THE COURT OF KING'S BENCH FOR THE PROVINCE
OF QUEBEC (Appeal Side).

BETWEEN :—

DAME CAMILLE ROLLAND, épouse contractuellement séparée de biens de SIDNEY HILDER, et ledit SIDNEY HILDER, pour autoriser sa dite épouse aux présentes,

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(Plaintiffs) APPELLANTS.

— AND —

STANISLAS JEAN-BAPTISTE ROLLAND, HENRI ROLLAND, PIERRE ROLLAND, ERNEST ROLLAND and VICTOR ARCHAMBAULT, tous cinq en leur qualité d'exécuteurs testamentaires, administrateurs et fidéicommissaires des successions de feu l'Honorable Jean-Baptiste Rolland, et de feu son épouse, Dame Esther Bouin dit Dufresne, et ledit Stanislas Jean-Baptiste Rolland aussi personnellement, LEON ROLLAND, Dame LUDIVINE ROLLAND, épouse contractuellement séparée de biens de Arthur Letondal, et ce dernier pour autoriser sa dite épouse aux présentes, Dame ALEXINA ROLLAND, épouse contractuellement séparée de biens de Oscar F. Mercier, et ledit Oscar F. Mercier pour autoriser sa dite épouse aux présentes, Dame ESTHER ROLLAND, épouse contractuellement séparée de biens de Louis-Philippe Turgeon, et ce dernier pour autoriser sa dite épouse aux présentes, Dame ALICE LAROCQUE, veuve de Damien Rolland, junior, tant personnellement qu'en sa qualité de tutrice à Jean-Damien Rolland et Litta Rolland, tous deux enfants mineurs issus de son mariage avec ledit Damien Rolland, junior, et aussie en sa qualité d'exécutrice testamentaire de la succession dudit Damien

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Rolland, junior, J. M. SAVIGNAC, en sa qualité d'exécuteur testamentaire de ladite succession Damien Rolland, junior, conjointement avec ladite Dame Alice Larocque, MARCEL ROLLAND, NISIDA LEMIEUX, veuve de Emile Rolland, tant personnellement qu'en sa qualité de tutrice à Pauline Rolland, Jacques Rolland, Paul-Emile Rolland, Fernande Rolland et Cécile Rolland, tous enfants mineurs issus de son mariage avec ledit feu Emile Rolland, et aussi en sa qualité d'exécutrice testamentaire de la succession dudit feu Emile Rolland, la "Société d'Administration & de Fiducie", en sa qualité d'exécutrice testamentaire de la succession du dit feu Emile Rolland conjointement avec ladite Dame Nisida Lemieux, JOSEPH-HENRI DESROCHERS, tant personnellement qu'en sa qualité de tuteur à sa fille mineure Paule Desrochers issue de son mariage avec feu Blanche Rolland, et aussi en sa qualité d'exécuteur testamentaire de la succession de sa dite épouse, feu Blanche Rolland, et ladite, "Société d'Administration & de Fiducie", en sa qualité d'exécutrice testamentaire, conjointement avec ledit Joseph-Henri Desrochers, de la succession de ladite feu Dame Blanche Rolland - - - (Defendants),

— AND —

Lesdits LEON ROLLAND, LUDIVINE ROLLAND, épouse contractuellement séparée de biens dudit Arthur Letondal, et ledit Arthur Letondal pour autoriser sa dite épouse aux présentes, ALEXINA ROLLAND, épouse contractuellement séparée de biens dudit Oscar F. Mercier, et ledit Oscar F. Mercier pour autoriser sa dite épouse aux présentes, PIERRE ROLLAND, Dame ESTHER ROLLAND, épouse contractuellement séparée de biens dudit Louis-Philippe Turgeon, et ledit Louis-Philippe Turgeon pour autoriser sa dite épouse aux présentes, tous issus du mariage de l'Honorable Jean-Damien Rolland, et de feu Dame Albina Parent, ledit HENRI ROLLAND, JEAN ROLLAND, Dame ALICE ROLLAND, épouse

contractuellement séparée de biens de Charles-Edouard Marchand, et ledit Charles-Edouard Marchand pour autoriser sa dite épouse aux présentes, GEORGINE ROLLAND, épouse contractuellement séparée de biens de l'Honorable Thibodeau Rinfret, et ce dernier pour autoriser sa dite épouse aux présentes, OLIVIER ROLLAND, ACHILLE ROLLAND, Dame MARGUERITE ROLLAND, épouse contractuellement séparée de biens de Pierre Beaudry, et ce dernier pour autoriser sa dite épouse aux présentes, tous issus du mariage dudit Stanislas Jean-Baptiste Rolland et de Dame Albina Lanthier, ledit VICTOR ARCHAMBAULT, Delle ERNESTINE ARCHAMBAULT, fille majeure, Dame RENA ARCHAMBAULT, épouse contractuellement séparée de biens de J. A. G. Belisle, et ce dernier pour autoriser sa dite épouse aux présentes, Dame YVONNE ARCHAMBAULT, épouse contractuellement séparée de biens de M. Lassalle Archambault, et ce dernier pour autoriser sa dite épouse aux présentes, JOSEPH ARCHAMBAULT, BERTHE ARCHAMBAULT, fille majeure, AUGUSTE ARCHAMBAULT, PAUL ARCHAMBAULT, tous issus du mariage de feu Joseph Louis Archambault, et de feu Dame Ernestine Rolland, ROLLAND PREFONTAINE, FERNAND PREFONTAINE, tous deux issus du mariage de feu l'Honorable Raymond Préfontaine, et de Dame Hermentine Rolland, Dame JULIENNE FOUCHER, épouse de G. L. Marsolais, et ce dernier pour autoriser sa dite épouse aux présentes, ERNEST FOUCHER, MAURICE FOUCHER, JEANNE FOUCHER, fille majeure, Dame BERTHE FOUCHER, épouse contractuellement séparée de biens de Maurice Bénard, et ce dernier pour autoriser sa dite épouse aux présentes, ANTOINETTE FOUCHER, fille majeure, tous issus du mariage de Auguste-Achille Foucher, et de feu Dame Lumina Rolland, ROBERT ROLLAND, Dame GERTRUDE ROLLAND, épouse contractuellement séparée de biens de Teefy Mulcahy, et ce dernier pour autoriser son épouse aux

présentes, LOUIS ROLLAND, HERMAN ROLLAND, et ledit, ERNEST ROLLAND, tous issus du mariage de feu Octavien Rolland, et de Dame Mattie Lee-Yancey, DONATIEN ROLLAND, issu du mariage de feu Donatien Rolland, et de feu Dame Henrietta Wilson, ARISTIDE M. JONCAS, ce dernier en sa qualité de tuteur a ses enfants mineurs issus de son mariage avec feu Dame Estelle Rolland, lesdits Donatien Rolland et 10 feu Dame Estelle Rolland, issus avec la demanderesse, du mariage de feu Donatien Rolland, et de feu Dame Henrietta Wilson, tous en leur qualité d'appelés aux substitutions créées par les testaments respectifs de feu l'Honorable Jean-Baptiste Rolland, et de feu Dame Esther Bouin dit Dufresne, épouse dudit Sieur Jean-Baptiste Rolland; ledit Sieur Stanislas Jean-Baptiste Rolland et ladite Dame Hermentine Rolland, veuve dudit 20 feu l'Honorable Raymond Préfontaine, et DELLE EUPHROSINE ROLLAND, fille majeure, tous trois en leur qualité de grevés aux substitutions créées par les dits testaments, desdits Sieur Jean-Baptiste Rolland et Dame Esther Bouin dit Dufresne, et JOSEPH CHARLES PELLETIER, en sa qualité de curateur aux dites substitutions.

(Mis-en-cause) RESPONDENTS.

AND BETWEEN—

STANISLAS JEAN-BAPTISTE ROLLAND, 30
HENRI ROLLAND, PIERRE ROLLAND and VICTOR
ARCHAMBAULT (tous quatre es qualité), STANISLAS
JEAN-BAPTISTE ROLLAND, LEON ROLLAND, Dame
LUDIVINE ROLLAND, ARTHUR LETONDAL, Dame
ALEXINA ROLLAND, OSCAR F. MERCIER, Dame
ESTHER ROLLAND, LOUIS PHILIPPE TURGEON,
Dame ALICE LAROCQUE, es qualité, J. M.
SAVIGNAC, es qualité, MARCEL ROLLAND, LA
SOCIETE D'ADMINISTRATION ET DE FIDUCIE, es
qualité, Dame NISIDA LEMIEUX, es qualité, and 40
JOSEPH HENRI DESROCHERS es qualité
(Defendants)

— AND —

LEON ROLLAND, Dame LUDIVINE ROLLAND,
ARTHUR LETONDAL, Dame ALEXINA ROLLAND.

OSCAR F. MERCIER, PIERRE ROLLAND, Dame ESTHER ROLLAND, LOUIS PHILIPPE TURGEON, HENRI ROLLAND, JEAN ROLLAND, Dame ALICE ROLLAND, CHARLES EDOUARD MARCHAND, OLIVIER ROLLAND, ACHILLE ROLLAND, Dame MARGUERITE ROLLAND, PIERRE BEAUDRY, EUPHROSINE ROLLAND, Dame GEORGINE ROLLAND and The Honourable T. RINFRET.

(Mis-en-cause) APPELLANTS.

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— AND —

DAME CAMILLE ROLLAND and SIDNEY HILDER her husband for the purpose of authorising his wife

(Plaintiffs) RESPONDENTS.

(CONSOLIDATED APPEALS.)

CASE

— FOR —

20 Stanislas Jean-Baptiste Rolland, Henri Rolland, Pierre Rolland, Victor Archambault (all four es-qualité), Stanislas Jean-Baptiste Rolland, Leon Rolland, Dame Ludivine Rolland, Arthur Letondal, Dame Alexina Rolland, Oscar F. Mercier, Dame Esther Rolland, Louis Philippe Turgeon, Dame Alice Larocque, es-qualité, J. M. Savignac, es-qualité, Marcel Rolland, La Societe d'Administration et de Fiducie, es-qualité, Dame Nisida Lemieux, es-qualité and Joseph Henri Desrochers, es-qualité - - - (Defendants)

— AND —

30 Leon Rolland, Ludivine Rolland, Arthur Letondal, Alexina Rolland, Oscar F. Mercier, Pierre Rolland, Esther Rolland, Louis Philippe Turgeon, Henri Rolland, Jean Rolland, Alice Rolland, Charles Edouard Marchand, Olivier Rolland, Achille Rolland, Marguerite Rolland, Pierre Beaudry, Euphrosine Rolland, Georgine Rolland and The Honourable Thibodeau Rinfret - - - (Mis-en-cause)

(SOME OF THE RESPONDENTS IN THE MAIN APPEAL AND THE APPELLANTS IN THE CROSS-APPEAL).

NOTE.—For convenience of reference the Appellant in the Main Appeal and the Respondent in the Cross-Appeal are referred to herein as “the Plaintiff”; while the appearing Respondents and Mis-en-Cause in the Main Appeal and Appellants in the Cross-Appeal are herein referred to as “the Defendants”.

RECORD.

- p. 129. 1. This is an appeal from the judgment of the Court of King’s Bench (appeal side), Province of Quebec, Canada (Dorion, Tellier, Howard, Bernier and Galipeault, J.J.), confirming a judgment of Philippe Demers, J., rejecting the main contention of the Plaintiff, but acknowledging her rights to a share of the revenues of the estate of her grand-father, and ordering the testamentary executors to account to her for her share.
- p. 77.
2. Upon appeal, and cross-appeal, the judgment of Demers, J., was unanimously confirmed.
- p. 171. 3. The circumstances out of which the appeal and 10 cross-appeal arise are as follows:—The Honourable J. B. Rolland, in his lifetime a member of the Senate of the Dominion of Canada and a manufacturer of the City of Montreal, made his Will bearing date the 13th November, 1885. He was married to Dame Esther Bouindit Dufresne under the régime of community of property. His wife, on the same day as he did, also made a Will which, for all purposes material to the present case, was identical to that of her husband.
- pp. 171-178. 4. The Will of the Testator is printed *in extenso* in the record, and the important clauses are quoted in the pleadings and in the judgments. The general tenor of the Will may be stated to be the following:—The entire usufruct 20 of the estate is left to the surviving consort during her lifetime. At her death, the usufruct goes in equal shares to the then living children of the testator; but the children are entitled to share in the usufruct only upon their returning to the mass of the estate the amount given to each of them in advance of inheritance (en avancement d’hoirie). The estate itself is to be divided between the grandchildren born or to be born in legitimate marriage of the children in the first degree; but the partition of the estate is to take place after the death of the last surviving child, at 30 which time only the said grand-children shall have acquired rights in the estate (“auquel temps seulement mes petits-enfants auront des droits acquis dans mes biens ou dans les biens qui les représenteront”). If, before the date fixed for the partition of the estate, a child dies without leaving issue, his share of the usufruct accrues to the other children. (i.e. his brothers and sisters). The question as to what becomes of his share of usufruct if he dies leaving issue is one of the contentious matters in the case and will have to be referred to later. The testator bequeaths to his four sons 40 exclusively his interest in the book-trade which he carried on, under
- p. 173, l. 6.
- p. 174, l. 41.

the name of "J. B. Rolland & Fils" and he directs that this particular legacy is bequeathed beyond their share and with an exemption from return. In order to carry out the provisions of his Will, he appoints his four sons as testamentary executors, administrators and trustees (fiduciaires) and provides for their replacing. Then comes the clause which has been the main cause of the present appeal:—

10 "Je déclare par mon présent testament avoir fait un avancement d'hoirie
 "de ma succession future et de la succession future de ma dite épouse, de la
 "somme de dix mille piastres, dit cours, à chacun de nos enfants en cinq
 "paiements de deux mille piastres chaque, étant pour cinq versements au fond
 "capital souscrit dans la Compagnie de Papier Rolland, dont le premier paiement
 "a eu lieu le trente de septembre mil huit cent quatre-vingt-deux, le second
 "paiement le quatorze d'octobre suivant, le troisième paiement le quinze de
 "novembre suivant le quatrième paiement le quinze de décembre suivant et
 "enfin le cinquième paiement le quinze de janvier suivant, le tout sujet à mes
 "dispositions testamentaires de mon présent testaments ainsi qu'à celles du
 "testament de ma dite épouse.

pp. 176, l. 19

to

p. 177, l. 15.

20 "Duquel avancement d'hoirie une reconnaissance a été donnée par chacun
 "de mes enfants, savoir :—

20 "Par Stanislas Jean-Baptiste Rolland, en date du vingt et un de mai
 "dernier (1885)—

"Par J. D. Rolland en date du vingt-six de mai dernier (1885)—

"Par Ernestine Rolland épouse de J. L. Archambault, en date du
 "vingt-six de mai dernier (1885)—

"Par Prisque D. Rolland, en date du vingt-sept de mai dernier
 "(1885)—

"Par Oct. Rolland en date du vingt-sept de mai dernier (1885)—

30 "Par Hermantine Rolland, épouse de R. Préfontaine, en date du
 "trente de mai dernier (1885)—

"Par Lumina Rolland, épouse d'Auguste Achille Foucher, en date du
 "trente de mai dernier (1885)—

"Et enfin par Moi Testateur pour ma fille mineure Marguerite
 "Eugénie Euphrosine Rolland en date du dix-sept de juin dernier
 "(1885)—

40 "Toutes ces reconnaissances sont signées en présence de L. Labrie,
 "Secrétaire Trésorier de la Compagnie de Papier Rolland et sont déposées pour
 "minutes dans le Notariat de J. E. O. Labadie, l'un des notaires soussignés
 "suivant acte de Dépot par moi et ma dite épouse devant le dit Mtre J. E. O.
 "Labadie, notaire, en date de ce jour"—.

As to the \$20,000.00 shares which the testator owned himself in the Company, he bequeaths them exclusively to his four sons, in equal shares, again with an exemption from return.

5.. The Honourable Mr. Rolland died on the 22nd of March, 1888. After his death, as a consequence of his Will and of the community of property which had existed between him and his wife, his widow became possessed of all the estate until her own death which occurred on the 26th of October, 1892. At the death of Mrs. Rolland, all the children were still living, to wit four sons and four daughters. Under both the Wills of Mr. and Mrs. Rolland, the 10 children immediately succeeded in equal shares in the enjoyment of the undivided estate. At the date when the present action was brought, three of the children, one son and two daughters, were still living.

6. The Plaintiff is a grand-daughter of Mr. and Mrs. Rolland, being the daughter of Donatien Rolland, one of their sons. She was born in January 1892, about nine months before the death of her grand-mother, but almost four years after the death of her grand-father, at which time she was not yet conceived.

7. Donatien Rolland died on the 3rd of June 1907, leaving three 20 children, one son, the Plaintiff, and another daughter, and on the 13th of September 1907 the three children, including the Plaintiff renounced to the succession of their father.

8. The Defendants, in the action, are the surviving testamentary executors, administrators and trustees, or the heirs and representatives of the testamentary executors, administrators and trustees who have died.

9. The mis-en-cause are the two surviving daughters, all the grand-children, and some of the great-grand-children. A number of the grand-children joined with the Defendants in the action in 30 upholding their views before the Superior Court and the Court of Appeal, in the province of Quebec, and are now also included in the definition "Defendants" as used in this case. The other mis-en-cause took no part in the proceedings.

p. 21, l. 1.

10. The action was brought by the Plaintiff as a grand-daughter of Mr. and Mrs. Rolland. The Plaintiff claimed that immediately upon the death of her father she became the absolute owner of her alleged share in the estate. Therefore, she asked that the testamentary executors be ordered to account to her for that share, and that it be declared that 80% of the shares of *La Compagnie* 40 *de Papier Rolland*, to wit all the shares except those especially bequeathed to the four sons by the Will, formed part of the estate

p. 21, l. 5.

and should be included in the capital sum or mass of the estate for which the testamentary executors should be held accountable. That contention was based on the allegation that the 80% shares were given *en avancement d'hoirie* by Mr. Rolland to his eight children and by the Will were ordered to be returned to the mass of the estate.

10 11. The Defendants denied that, upon the death of her father, the Plaintiff acquired any right entitling her to a share in the estate or in the revenues thereof, or, in fact, giving her any status to bring the action at all. They claimed that, under the Will, she would acquire rights only upon the death of the last surviving child of the testators. They also denied, at all events, that the 80% of shares of *La Compagnie de Papier Rolland*, ever formed part of the estates, either in fact or in law. p. 22. p. 24, l. 19

20 12. The trial judge (Demers, J.) held as a fact that the 80% of shares of *La Compagnie de Papier Rolland* never belonged to the testators, were not given to the children *en avancement d'hoirie*, were not transmitted by the death of the testators and were not to be returned to the mass of the estate either in fact or in law. As a consequence, he decided that the 80% of shares were not to form part of the account which the testamentary executors ought to render to the Plaintiff. He held, however, that the Plaintiff had a status. He interpreted the Will not as creating a substitution, but as a bequest of usufruct, first to the surviving consort, afterwards to the children; and, in case of death of one of the children, to the children, if any, of the deceased child, for his share. The ownership, he thought, devolved to the grand-children immediately upon the respective deaths of the testators, subject to the condition that the estate could not be divided until after the death of all the children. The Plaintiff being, in the learned Judge's opinion, entitled to one-third of the share of her father in the revenues of the estate, he ordered an account accordingly. p. 77. p. 81. p. 82.

30 13. From that judgment, there was an appeal and a cross-appeal to the Court of King's Bench, the Plaintiff contending that the 80% of shares should form part of the account, and the Defendant while supporting the judgment on that branch of the case, contending that the Plaintiff had no status to bring the action and that her rights, if any, would exist only after the death of the last surviving child of the testator. The appeal and the cross-appeal were consolidated by order of the Court.

40 14. The Court of Appeal unanimously confirmed the judgment of the trial Judge, including the finding of fact that the 80% of shares never belonged to the testators, and had not been given to the children *en avancement d'hoirie*. All the Judges, moreover, concurred p. 129.

in the view that in point of law, even if the shares had been given *en avancement d'hoirie*, not the shares themselves, but only their value in money at the time of the gift would have to be returned to the mass of the estate. The Court held that what had been given *en avancement d'hoirie*, was a sum of \$10,000 to each of the children, that such amount should be returned by each of them, under the terms of the Wills, and should form part of the account to be rendered.

pp. 143, 156. **15.** On the question of the status of the Plaintiff two Judges, Howard J. and Galipeault, J. confirmed the Superior Court purely 10 and simply.

p. 130. Dorion J. thought that it was not necessary to discuss whether the Will created a substitution or not. In his opinion, the Plaintiff upon the death of her father, became entitled to a portion of the share of the latter in the revenues of the estate, and that was sufficient to give her a status to bring an action to account.

p. 135. Tellier J. expressed the view that the bequest of ownership was made only to the grand-children born or to be born who would be living at the death of the last surviving child of the testator; but in the meantime they succeeded in the right of their deceased father or 20 mother to a share in the usufruct of the estate, and the ownership remained vested in the testamentary executors, administrators and trustees. The Plaintiff had become one of the usufructuaries; she may become one of the legatees in ownership; that was sufficient to give her a right of action.

p. 143. Bernier J. also expressed the view that the Plaintiff had a sufficient status to maintain her action.

p. 130. **16.** As a consequence, the appeal and the cross-appeal were dismissed, and the judgment was confirmed, by adding to it, so as to avoid all doubts, that the account to be rendered should include 30 the amounts given *en avancement d'hoirie*, to wit \$80,000.00, which should be returned to the testamentary executors by all those responsible therefor.

AS TO THE MAIN APPEAL.

17. The Defendants will support the judgments appealed from, and will urge the following contentions. In point of fact, the 80% of shares of *La Compagnie de Papier Rolland* never belonged to the testators, were not given *en avancement d'hoirie*, and were not to be returned by the children. These shares were always in the respective names of the children. 40 They were subscribed by them, and their names were entered in the

books of the Company as owners of the shares since the beginning. They were paid for by the children by cheques or by notes to the order of the Company. The Company used those cheques and those notes as part payment of the purchase price of certain properties, privileges and franchises acquired from Mr. Rolland, and he became the holder of the cheques and notes. He then elected to remit those cheques and those notes to his children; but that did not modify the nature of the transaction and could not make him owner of the shares. At no time were the shares in the name of The Honourable
 10 Mr. Rolland. When the action was brought, the possession and ownership of the shares by the children had remained undisputed for at least forty years. Moreover, there exists contemporaneous documentary evidence to the effect that what was given *en avancement d'hoirie* was an amount in money, and not the shares. On the 13th November 1885, The Honourable Mr. Rolland and his wife declared before a notary public, Mtre. J. E. O. Labadie:—

“avoir fait un avancement d'hoirie de leurs successions futures, de la somme p. 179, l. 20.
 “de dis mille piastres, cours actuel à chacun de leurs enfants en cinq paiements
 20 “de deux mille piastres chaque, étant pour cinq versements au fonds capital
 “souscrit dans la Compagnie de Papier Rolland”.—

At the same time, Mr. and Mrs. Rolland deposited with the notary, p. 180, l. 10.
 for safe keeping, documents described as “reconnaisances”, signed by each of their eight children and acknowledging receipt from their father and mother in exactly the same terms. The documents show that the gift *en avancement d'hoirie* consisted in amounts of \$10,000 to each of the children. It is submitted that the concurrent findings of both courts were right in so deciding and that, on the evidence, no other finding would be justified.

30 18. But the Plaintiff contends that, notwithstanding the fact that only an amount in money was given, the shares themselves should be returned to the mass of the estate.

19. The contrary intention appears from the words used by the testator in the Will. The gift *en avancement d'hoirie* is referred to p. 171.
 throughout as an amount in money (“montant”) or “somme de
 “\$10,000 dit cours.” Such also is the wording used by the testator to describe what should be returned by the children to the estate
 (“en par chacun d'eux faisant rapport à la masse de ma succession p. 173, l. 4.
 “du montant qu'ils auront reçu en avancement d'hoirie de ma
 “succession”). The interpretation put upon those words by both
 40 Courts is further supported by later references in the Will. As already said, Mr. Rolland bequeaths to his four sons the 200 shares which he himself owned in *La Compagnie de Papier Rolland*, valued at \$20,000, to be divided equally between them. At the end of the

p. 177, l. 20.

Will, referring to that bequest, he says that, as a consequence, after his death, each of his sons will thereby own \$15,000 of shares in the Company, ("leur faisant quinze mille piastres de parts à chacun d'eux dans la dite compagnie"). The statement cannot be reconciled with the Plaintiff's contention that the shares originally owned by the children would have to be returned by them.

p. 177, l. 31.

20. The subsequent paragraph of the Will further confirms that interpretation. This paragraph prohibits the alienation of the shares. The prohibition is addressed not to the testamentary executors, administrators and trustees, in whom the estate is vested by the Will, but to the individual children ("dits héritiers"), who are thus envisaged as remaining the owners of the original shares after the death of the testator; a provision quite incompatible with the view that the children were called upon by the Will to return the shares to the estate.

p. 177, l. 26.

21. In that clause, the testator uses the expression: "parts en avancement d'hoiries". The Plaintiff laid stress on that expression. It is submitted that this is easily explained. The testator, in the paragraph immediately preceding, had referred to his own shares left by the Will to his four sons. He wished therefore to distinguish, from the shares so given, the shares already owned by his eight children and paid by means of the amount of \$10,000, given by him "en avancement d'hoirie". It is submitted that the phrase may not be given a meaning, nor can an intention be ascribed to it contrary to the facts, the "reconnaisances" signed by the children, the whole tenor of the Will and the very effect of the clause of the Will in which it is found. Words much clearer than those used in an incidental and isolated phrase such as this, would be required to prevail against the whole of the evidence, which is altogether in the opposite direction.

22. It is submitted that all possible doubts about the above interpretation, was finally removed by the Statute of the Province of Quebec, ch. 84 of 2 Ed. VII (1902) which has reference to the shares now in question and the material clause of which reads as follows:—

"8a. The following heirs, to wit: Jean-Damien Rolland, Stanislas-Jean-Baptiste Rolland, Ernestine Rolland wife of J. L. Archambault, Prisque-D. Rolland, Octavien Rolland, Hermantine Rolland, wife of R. Préfontaine, Lumina Rolland, wife of Auguste-Achille Faucher, Marguerite-Eugénie-Euphrosine Rolland, mentioned in the said wills of the late Jean-Baptiste Rolland and of Dame Esther Bouin dit Dufresne as being the owners each of one hundred shares in the Rolland Paper Company, are declared to be absolute owners of the said shares with power to dispose of the same."

23. The Defendants wish to urge their contentions on the facts and on the point of construction of the Will mainly to show the intention of the testator derived from the circumstances, the documents anterior to the Will and the words used in the Will itself; for it is submitted that, as decided by the Trial Judge and the Court of Appeal, the question whether the shares themselves, and not an amount in money, were given *en avancement d'hoirie* is immaterial and the result is the same in point of law.

24. The word "rapport", or, in English: "return", has a well defined and recognized meaning under the Civil Code of the Province of Quebec.

10 **25.** The whole subject is treated in Articles 689 to 734 inclusive of the Code. These articles are included in the first title of the third book of the Code dealing with successions. Succession is defined as follows:—

"596. Succession is the transmission by law or by the will of man, to one
"or more persons, of the property and the transmissible rights and obligations
"of a deceased person.

"In another acceptation the word 'Succession' means the universality of
"the things thus transmitted.

20 "597. Abintestate succession is that which is established by law alone,
"and testamentary succession that which is derived from the will of man.
"The former takes place only in default of the latter.

"Gifts in contemplation of death partake of the nature of testamentary
"successions.

"The person to whom either of these successions devolves is called heir."

Articles 689 to 734 inclusive are contained in the chapter entitled
"Of partition and returns". It is submitted that these articles apply
to both the ab intestate succession and the testamentary succession,
by the sole operation of law in any case; but that, at all events, there
can be no doubt that they apply to a testamentary succession, when
30 the Will expresses the intention that a "return" should be made to
the estate (Refer: Baudry-Lacantinerie, 3rd Ed. "Successions" vol.
3, p.198, No. 2694). Both Courts have so decided.

26. Moreover, when a testator like The Honourable Mr. Rolland and a Notary Public are found to have used that word in a Will, they must be taken to have made use of it within the meaning given to it in the Code.

27. Now the manner in which a return is made under the relevant law is thus stated in the Code:—

"700. Each co-heir returns into the mass, according to the rules herein-
"after laid down, the gifts made to him and the sums in which he is indebted."

"701. If the return be not made in kind, the co-heirs entitled to it
"pretake an equal portion from the mass of the succession.

"These pretakings are made as much as possible in objects of the same
"nature and quality as those which are not returned in kind."

* * * * *

"712. Every heir, even the beneficiary heir, coming to a succession, must
"return to the general mass all that he has received from the deceased by gift
"inter vivos, directly or indirectly; he cannot retain the gifts made nor claim
"the legacies bequeathed by the deceased, unless such gifts and legacies have
"been given him expressly by preference and beyond his share, or with an
"exemption from return." 10

* * * * *

"716. A grandson coming to the succession of his grandfather is bound
"to return what has been given to his father, although he should renounce
"the succession of the latter."

* * * * *

"723. Returns are due only from co-heir to co-heir; they are not due
"to the legatees nor to the creditors of the succession."

"724. Returns are effected either in kind or by taking less."

"725. The return of moveable property is only made by taking less; it
"cannot be returned in kind." 20

"726. The return of money received is also made by taking less in the
"money of the succession. In case of insufficiency the donee or legatee may
"dispense with the return of money, by abandoning a proportionate value in
"the moveable property, or in default of moveable property, in the immoveables
"of the succession."

* * * * *

"728. As to immoveables, the donee, or legatee may at his option return
"them in all cases, either in kind or by taking less according to valuation."

* * * * *

"734. The moveable things found in the succession, and those which
"are returned as being legacies, are likewise estimated according to their
"condition and value at the time of the partition, and those which are returned
"as having been given, according to their condition and value at the time of
"the gift." 30

28. It therefore follows, that even if we assume that what was given to the children were shares and not sums of money, the result would be the same. The shares could not be returned in kind; (725 C.C.); being moveable property (387 C.C.) they would

have to be estimated according to their condition and value at the time of the gift (734 C.C.); the subject matter of the return would be their value estimated as above, and that would also mean \$10,000.00 for each child.

29. Perhaps it may be useful to add that, even if there was no rule laid down in the Code as to the value which is to be returned in money, the Plaintiff has failed to show that the obligation of "returning" would, in any way, apply to the value of the shares sold on the 23rd April, 1928, for \$4,000,000. The shares then sold
10 were not the shares of the original "*Compagnie de Papier Rolland*" alleged by the Plaintiff to have been given *en avancement d'hoirie*.

The original *Compagnie de Papier Rolland* was incorporated as a provincial company on the 1st of May, 1882, by the statute of Quebec 45 Victoria, ch. 77. At a General Meeting of the shareholders of that Company, on the 29th of June, 1908, at which all the shareholders were represented, it was resolved to liquidate the Company, to annul the shares and to sell the property and assets to the Rolland Paper Company Limited, a Company incorporated by letters patent of the Dominion of Canada on the 19th June, 1908. The Resolution
20 of the 29th of June, 1908, was carried out and the sale of the assets took place whereby all the original shareholders, except three, sold their interests in exchange for bonds since paid to them. As a result of the resolution and of the sale, the original *Compagnie de Papier Rolland* became extinct and the shares thereof were annulled. The new *Rolland Paper Company Limited* was a different and distinct concern with a capital of \$100,000.00. On the 15th April 1912, the capital was increased to \$1,000,000.00 by supplementary letters patent. Of this new capital, 2,000 shares were subscribed and fully paid for by the shareholders of the new company on the 27th May,
30 1912. 2,000 shares plus \$50,000. in money was given in payment to the shareholders of *La Compagnie des Moulins du Nord* upon the amalgamation of that Company with the Rolland Paper Company on the 28th of May 1912. Thus the shares sold on the 23rd of April, 1928, for \$4,000,000. represented not the shares of the original *Compagnie de Papier Rolland*, but the new capital of the Rolland Paper Company Limited formed in 1908 at the capital of \$100,000. and the new capital issued, subscribed and paid for from time to time under the supplementary letters patent, and also that given in payment as a result of the amalgamation with *La Compagnie des*
40 *Moulins du Nord*.

p. 242.

30. It will thus be seen that the shares which the Plaintiff sought to have returned to the mass were annulled by unanimous consent on the 29th of June, 1908. Should the Plaintiff succeed

in her contention, the question of the value at which the shares should be estimated is one no doubt properly to be left to the contestation of the account, more particularly in view of the fact that it was not discussed in the Courts below. But it is pointed out that on no consideration could the value of the shares be estimated on the basis of the sale made on the 23rd of April 1928. There was no continuity between the original shares and those sold in 1928. Even if the facts were otherwise, there exists no *jus in re* conferring a *droit de suite* under the law of the province of Quebec.

AS TO THE CROSS-APPEAL.

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31. It is submitted that upon any view the Plaintiff had no right entitling her to bring the action at the time it was brought.

32. The use of the word "usufruct" in the testamentary disposition does not preclude it from being regarded as a substitution. The rule is laid down in Article 928 of the Code:

"928. A substitution may exist although the term *usufruct* be used to express the right of the institute. In general the whole tenor of the act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptance of particular words, in order to determine whether there is substitution or not."

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p. 174, l. 41.

33. If the Will be considered as creating a substitution, it is submitted that the opening thereof is only at the death of the last surviving child: "auquel temps seulement mes petits-enfants auront des droits acquis dans mes biens ou dans les biens qui les représenteront". Under that interpretation, the Plaintiff, as substitute, can claim no right to the revenues of the estate until after all the children have died; and then only if she herself survives.

34. Nor can the Plaintiff be entitled to exercise, until the opening of the substitution, the rights of her father and receive her share in the revenues which would have accrued to him; since she has renounced the succession of the latter and cannot therefore, claim the benefit of Article 963 of our Civil Code, whereby it is enacted:—

"963. If by reason of a pending condition or some other disposition of the will, the opening of the substitution do not take place immediately upon the death of the institute, his heirs and legatees continue, until the opening, to exercise his rights, and remain liable for his obligations."

The Plaintiff relies upon her renunciation to the succession of her father, in order to escape the obligations and consequences

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resulting from the fact that her father, during his lifetime, disposed of the shares now in dispute, in favour of his co-heirs, under the statute of the Province of Quebec, 2 Ed. VII, ch. 84, above quoted; she cannot at the same time, get the benefits which would be derived from her title of heir-at-law of her said father.

35. But it is submitted that even if the Will does not create a substitution, there is no provision in it entitling the grandchildren to a share in the revenues of the estate while one or more of the children are living. It is respectfully submitted that the
 10 construction so put upon one of the clauses of the Will by the Courts below is erroneous. It is admitted that the clause does not in terms bequeath the revenues to the grandchildren. The Defendants' contention is that it does not do so impliedly, in view of the emphatic declaration by which the clause concludes: "Attendu
 "toujours qu'après le décès de tous mes enfants au premier degré,
 "comme le partage de mes autres biens". That condition is
 repeated in both cases where mention of the grandchildren is made
 in the Will and shows the intention of the testator that the rights
 of the grandchildren shall arise only after the death of all the
 20 children and shall accrue only to those of the grandchildren who shall then be alive.

36. There exists yet another reason why the Plaintiff should not be recognized as having a status in her action. Her present right, according to the judgments *a quo* is to a third portion of the share of her father in the revenues of the estate. The Will says that her father was to be entitled to a share in the revenues only upon making return to the mass of the estate of the amount which he had been given *en avancement d'hoirie*. If, as the Plaintiff contends, the children were bound to make that return, it is proven that her father
 30 never made it. It is also proven that he has never received any payment of revenues. This, on the part of the Plaintiff's father, may be taken to mean that he renounced the succession and wished to retain the gift;

"C.C.713. The heir may, nevertheless, by renouncing the succession, "retain the gifts or claim the legacies made to him."

At all events, under the terms of the Will, he was not entitled to any payment of revenues until he had made a return.

37. The obligation to return the gift, not carried out by her father, is now incumbent upon the Plaintiff as a "grand-daughter
 40 "coming to the succession of her grandfather." She is bound to return what has been given, although she has renounced the succession of her father (716 C.C.). She has not made that return. It is

submitted that her father, having failed to make the return, never had any right to a share of the revenues; and her own default also precludes her in the premises. The return was a condition precedent to her right of action.

38. Finally, it is submitted that the situation which the Plaintiff sought to disturb by her action has existed, since the death of Mr. Rolland in 1888 until 1928 and was the result of the accepted interpretation of the Will and of the circumstances by Mrs. Rolland, who made a similar Will, by all the children and by the whole family during a period of forty years, during which the children remained 10 in the undisputed possession of the shares, as owners. The Plaintiff herself became of age in 1913 and allowed the administration of the estate to be carried on, as it had been since the beginning, for fifteen years after that, without any complaint on her part. Her conduct constitutes acquiescence in all that was done.

39. It is submitted that the Action of the Plaintiff should be dismissed *in toto*, for the following, among other,

REASONS.

- (1) Because she has no status in the premises;
- (2) Because the Will created a substitution and the 20 Plaintiff acquired no right under it until after the death of the last surviving child of the testator;
- (3) Because having renounced to the succession of her father, she cannot exercise the rights of the latter, until the opening of the substitution, under Article 963 of the Civil Code;
- (4) Because, in any event, whether by substitution or otherwise, the Plaintiff took no right under the Will until after the death of the last surviving child (“qu’après le “décès de tous mes enfants au premier degré, auquel 30 “temps seulement mes petits-enfants auront des droits “acquis dans mes biens ou dans les biens qui les “représenteront”).
- (5) Because, upon any interpretation of the Will, the only right of the Plaintiff would be to a portion of the share of her father in the revenues of the estate, and
 - (a) her father never became entitled to a share in the revenues on account of his failure to return the amount which he had received *en avancement d’hoirie*;

(b) she did not herself make a return of the amount given *en avancement d'hoirie*, although she was bound to make that return.

(6) Because, by the operation of the rule of law covering returns under the Civil Code of Quebec, no amount had to be returned, in view of the fact that each of the children had received a gift equal in value and there was full compensation as between each child;

10 **40.** It is further submitted that the judgments as to the 80% of shares of *La Compagnie Papier de Rolland* should be confirmed, for the following, among other,

REASONS.

(1) Because the shares in question never belonged to the testators;

(2) Because the shares in question were not the subject matter of the gifts *en avancement d'hoirie* either in fact or for the reason that the testators never owned those shares;

20 (3) Because what was given *en avancement d'hoirie* was an amount of \$10,000 in money.

(4) Because the only gift subject to be returned under the terms of the Will is the said amount of \$10,000;

(5) Because, even if the gift *en avancement d'hoirie* was made of shares of *La Compagnie de Papier Rolland* and not of money (which is denied), under the law of Quebec the return thereof has to be made in money and not in kind;

30 (6) Because the amount in money which each child was bound to return ought to be estimated according to the condition and value of the thing given at the time of the gift;

(7) For the reasons given in the judgments below.

AIME GEOFFRION.

L. E. BEAULIEU.

A. VALLEE.

In the Privy Council.

**ON APPEAL
FROM THE COURT OF KING'S BENCH OF
THE PROVINCE OF QUEBEC
(Appeal Side).**

BETWEEN

**DAME CAMILLE ROLLAND and SIDN
HILDER, her husband, for the purpose of author
ing his wife - - (Plaintiffs) APPELLAN**

— AND —

**STANISLAS JEAN-BAPTISTE ROLLAND
Others (Defendants)**

— AND —

**LEON ROLLAND and Others (Mis-en-cause)
RESPONDEN**

AND BETWEEN

**STANISLAS JEAN-BAPTISTE ROLLAND
Others (Defendants)**

— AND —

**LEON ROLLAND and Others (Mis-en-cause)
APPELLAN**

— AND —

**DAME CAMILLE ROLLAND and Another
(Plaintiffs) RESPONDEN
(Consolidated Appeals).**

C A S E

**for some of the Respondents in the Main App
and the Appellants in the Cross-Appeal**

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